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Supreme Court, U.S.
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In The

Supreme Court of the United States

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CHRIS MALLIOS,

Petitioner,

v.

STANDARD INSURANCE COMPANY, FIRST FINANCIAL BENEFITS, INC., NULL LAIRSON, P. C. JAMES YARBROUGH, EDDIE BARR, EDDIE JANEK, STEPHEN HOLMES, KEN CLARK, PHILLIP LOHEC,

Respondents.

◆

On Petition For Writ Of Certiorari
To The Supreme Court Of Texas

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

Where the Fourteenth Court of Appeals in Houston, Texas is conferred jurisdiction by **Texas Rules of Appellate Procedure (TRAP) Rule 25.1 Perfecting Appeals** and the justices of the court refused to exercise that jurisdiction over the appeal from an order of the trial judge denying Petitioner's motion to reconsider grants of defendants' motions for summary judgment and where the justices of the court of appeals overrule Petitioner's motion for rehearing, is this an evasion by the justices of the Fourteenth Court of Appeals to defeat Petitioner's federal constitutional right to a jury trial in a civil case?

Where the Texas Supreme Court pursuant to **Texas Constitution Article 5 Judicial Department Section 31 Court Administration; Rule-Making Authority; Action on Motion for Rehearing** promulgates rules of civil procedure for all courts . . . necessary for the efficient and uniform administration of justice in the various courts and the justices of the Texas Supreme Court acknowledged the court of appeals had violated one of those rules but refused to demand compliance with the rule and where the Texas Supreme Court has jurisdiction to remand a matter to a court of appeals for further consideration by the court of appeals and the justices refused to remand, is this an evasion by the justices of the Texas Supreme Court to defeat Petitioner's federal constitutional right to a jury trial in his civil case?

QUESTIONS PRESENTED – Continued

Where the trial judge of the 122nd District Court of Galveston County, Texas refused to apply the burden of proof and standard of review in a hearing for motions for summary judgments, as required by ***Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217 (Tex.1999),** and denied Petitioner's motion to reconsider the grants of summary judgments, is this an evasion by the court to defeat Petitioner's constitutional right to a jury trial in his civil case?

PARTIES TO THE PROCEEDINGS

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The Fourteenth Court of Appeals opinion is reported at *Mallios v. Standard Ins. Co.*, 237 S.W.3d 778 (App.Tex. – 14th Dist. 2007) (App. 1). The order of the Fourteenth Court of Appeals overruling Petitioner's motion for rehearing (App. 29). The order of the Texas Supreme Court denying Petitioner's petition for discretionary review (App. 31). The order of the Texas Supreme Court denying Petitioner's motion for rehearing (App. 33). The order denying Petitioner's motion to reconsider grants of defendants' motions for summary judgments (App. 27).

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BASIS FOR JURISDICTION IN THIS COURT

United States Code Title 28 §1257(a) confers jurisdiction on the Court to review by writ of certiorari the opinions of the Texas Supreme Court, the Fourteenth Court of Appeals at Houston and the 122nd District Court of Galveston County where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Fourteenth Court of Appeals issued its written opinion on August 30, 2007 (App. 1) and issued its order overruling Petitioner's motion for rehearing on October 11, 2007 (App. 30). The Texas Supreme Court issued its denial of Petitioner's petition for discretionary review on January 11, 2008

(App. 31) and issued its denial of Petitioner's motion for rehearing on February 29, 2008 (App. 33). The judge of the 122nd District Court issued his denial of Petitioner's motion to reconsider grants of defendants' summary judgments on March 24, 2006 (App. 28).

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CONSTITUTIONAL AND STATE STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment 7 Trial by Jury in Civil Cases. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Texas Constitution Article 5 Judicial Department Section 31 Court Administration; Rule-Making Authority; Action on Motion for Rehearing. (a) The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts. (b) The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts. (c) The legislature may delegate to the Supreme Court or Court of

Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law.

Texas Rules of Appellate Procedure Rule 25 Perfecting Appeals

25.1 Civil Cases.

(a) ***Notice of appeal.*** An appeal is perfected when a written notice of appeal is filed with the trial court clerk. If a notice of appeal is mistakenly filed with the appellate court, the notice is deemed to have been filed the same day with the trial court clerk, and the appellate clerk must immediately send the trial court clerk a copy of the notice.

(b) ***Jurisdiction of appellate court.*** The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from. Any party's failure to take any other step required by these rules, including the failure of another party to perfect an appeal under (c), does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately, including dismissing the appeal.

(c) ***Who must file notice.*** A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal.

Texas Rules of Appellate Procedure Rule 34 Appellate Record.

(b) Request for additional items.

(1) *Time for request.* At any time before the clerk's record is prepared, any party may file with the trial court clerk a written designation specifying items to be included in the record.

(2) *Request must be specific.* A party requesting that an item be included in the clerk's record must specifically describe the item so that the clerk can readily identify it. The clerk will disregard a general designation, such as one for "all papers filed in the case."

Texas Rules of Appellate Procedure Rule 38.1 Appellant's Brief

(d) ***Statement of the case.*** The brief must state concisely the nature of the case (e.g., whether it is a suit for damages, on a note, or involving a murder prosecution), the course of proceedings, and the trial court's disposition of the case. The statement should be supported by record references, should seldom exceed one-half page, and should not discuss the facts.

(e) ***Issues presented.*** The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

(f) ***Statement of facts.*** The brief must state concisely and without argument the facts pertinent to the issues or points presented. In a civil case, the court will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references.

(h) ***Argument.*** The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.

(i) ***Prayer.*** The brief must contain a short conclusion that clearly states the nature of the relief sought.

Texas Rules of Appellate Procedure Rule 47.1 Written Opinions. The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.

Texas Rules of Appellate Procedure Rule 56.1 Orders on Petition for Review (b) Petition Denied or Dismissed. When the petition has been on file in the Supreme Court for 30 days, the Court may deny or dismiss the petition – whether or not a response has been filed – with one of the following notations:

(1) "Denied" If the Supreme Court is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects, but determined that the petition presents no error that requires reversal or

> that is of such importance to the jurisprudence of the state as to require correction, the Court will deny the petition with notation "Denied."

Texas Rule of Civil Procedure Rule 166(a) Summary Judgment. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

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STATEMENT OF THE CASE

Mr. Chris Mallios, Petitioner, filed this class action lawsuit alleging violation of Texas Deceptive Trade Practices Act, Texas Insurance Code and Conspiracy. The defendants are: Standard Insurance Company (hereafter Standard) issuer of Group Policy 602107, James Yarbrough, Eddie Barr, Eddie Janek, Stephen Holmes and Ken Clark, Trustees (hereafter Members) of the 457 Deferred Compensation Plan, First Financial Benefits, Inc., Plan Administrator (hereafter Administrator), Philip Lohec, former Galveston County Auditor (hereafter Auditor) and Null Lairson, P.C. an outside auditing firm (hereafter Firm). Galveston County, the policy owner, nor

Galveston County Commissioners' Court are parties to this lawsuit.

In 1987, Galveston County, a political subdivision of the State of Texas, convinced it employees to opt out of Social Security. The county established an Internal Revenue Service sanctioned 457 Deferred Compensation Plan (hereafter Plan). The Plan provided three benefits: retirement, survivorship and disability. The survivorship benefit was the group life insurance policy 602107 issued by Standard. Unlike Social Security, the vesting period for the benefits was the "first day of work" at the county. After Petitioner left the county, he discovered the defendants made material misrepresentations which he and other employees relied on and fraudulently used the insurance premiums to purchase an equity interest in the name of and for the benefit of Galveston County, the employer. The insurance policy provided among other things:

> Standard Insurance Company agrees to pay the benefits provided by this Group Policy, in accordance with the provisions of this Group Policy.
>
> The consideration for this Group Policy is the application of the Policy owner and the payment by the Policy owner of premiums as provided herein.
>
> Initial premium rate: $.24 monthly per $1,000 of life insurance

> Standard will issue certificates to the Policy owner showing the insured members' coverage under this Group Policy. The Policy owner will distribute an individual certificate to each insured member.
>
> Subject to all the terms of the Group Policy, Standard will pay the amount of the life insurance shown in B of this Part 5 upon receipt of satisfactory written proof of your death while you were insured under the Group Policy.

In 1997, Standard developed what it called a "demutualization plan" to change its business model from a mutual insurance company to an insurance company that could issue stock. Standard contacted the Administrator and Members and secured an agreement to use the employees' 1997, 1998 and 1999 premium payments for life insurance to invest in Standard's capital surplus account, in the name and for the benefit of Galveston County.

Petitioner and the other county employees were never issued certificates to prove they were insured under Group Policy 602107 and they were not informed and did not agree to have their insurance premium payments used as an investment in Standard in the name and for the benefit of Galveston County. The Auditor did not disclose, in the financial statements required to be prepared for public reporting, the premium payments were being diverted from purchasing life insurance to purchasing an investment in Standard in the name of and for the benefit of Galveston County. The Firm that audited the financial statements prepared by the Auditor, for the time period, did not disclose the Auditor's failure to disclose the premium payments being used to invest in Standard instead of purchasing Petitioners and employees' life insurances.

Standard was successful in becoming a stock company but the Texas Constitution prohibited Galveston County from owning stock. Standard liquidated the county's stock holdings and returned approximately $2,400,000. Members and the Administrator with help of the Auditor and the Firm diverted the money from the 457 Deferred Compensation Plan to another retirement plan to pay an actuarial cost of Galveston County.

In 2004, Petitioner discovered what defendants had done and filed this lawsuit. The trial judge granted summary judgments to defendants on the theory the defendants had established affirmative defenses as matters of law. Petitioner filed a motion to reconsider (App. 35) to the trial judge asserting that defendants had not established the affirmative defenses as matters of law and pointed out to the trial judge in the motion, the material fact questions raised that precluded the trial judge from granting summary judgments as matters of law (App. 37, 38, 39, 40, 42, 44) and the potential loss of a jury trial (App. 36) and prayed the trial judge to deny in their entirety the summary judgments granted to defendants (App. 47). After considering the motion, the trial judge denied it (App. 27). Petitioner appealed the denial of his motion to the court of appeals in Houston (App. 49). The error committed by the trial judge was the denial of Petitioner's motion to reconsider (App. 54, last para.). The court of appeals issued a written opinion affirming the trial judge's grants of summary judgments to defendants (App. 1). However, the written opinion did not address the error committed by the trial judge, the denial of Petitioner's motion to reconsider (App. 1).

A motion for rehearing was filed with the court of appeals pointing out the justices had not addressed the briefed error the trial judge denial of Petitioner's motion to reconsider (App. 68). The court of appeals overruled the motion for rehearing (App. 30). Petitioner filed a petition for discretionary review (App. 79) which included in an appendix: the motion to reconsider, notice of appeal, and designation of record (App. 91) before the Texas Supreme Court. Texas Supreme Court denied the petition for discretionary review (App. 31). Petitioner filed a motion for rehearing (App. 92) and later appellant's brief (App. 101) pointing out to Texas Supreme Court, the court of appeals had refused to exercise its jurisdiction and decide Petitioner's briefed point of error and refused to follow **Texas Appellate Rule 47.1** promulgated by Texas Supreme Court. Texas Supreme Court denied the motion for rehearing (App. 33). From Texas Supreme Court's denial of the motion for rehearing Petitioner seeks Certiorari from this Court.

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REASON FOR GRANTING CERTIORARI

In order to give United States Supreme Court jurisdiction to review final judgment of the highest court of a state, a claim of federal right must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate actions under state system of pleading and practice; and upon question whether or not such claim has been so asserted, decision of state court is binding upon supreme court when it is clear that such decision was not rendered in spirit of evasion, for purpose of defeating claim of federal right ***Hartford Life Insurance Company v. Johnson,*** 249 U.S. 490, 63 L.Ed. 722, 724, 39 S. Ct. 336 (1919).

In ***Food Employees v. Logan Plaza,*** 391 U.S. 308 (1968) the question presented was whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an un-consented invasion of the property rights of the owners of the land on which the center is situated. The Court granted certiorari to consider petitioners' contentions that the decisions of the state courts enjoining their picketing as a trespass are violative of their rights under the First and Fourteenth Amendments of the United States Constitution. The judgment of the Supreme Court of Pennsylvania is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Petitioner and Defendants filed motions for summary judgments. Petitioner's motion was denied with prejudice and ordered to "take nothing" as a result of his lawsuit. Defendants' motions were granted by the trial judge on the legal theory that they were entitled to summary judgments on their affirmative defenses as matters of law. Petitioner believed the trial judge committed error and filed a motion to reconsider grants of Defendants' motions for summary judgments (App. 35) which was denied (App. 27). "In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion" ***Cecil v. Smith,*** 804 S.W.2d 509, 511 (Tex. 1991).

The motion pointed out to the trial judge "the purpose of summary judgment procedure is to permit the trial court to promptly dispose of cases that involve unmeritorious claims or untenable defenses. . . . It is not to deprive litigants of their right to a trial by jury" (App. 36). The motion went on to point out the burden of proof required of the party seeking summary judgment and the standard of review the trial judge must apply when determining whether to grant summary judgment (App. 36, 37). It also pointed out the material fact issues that precluded summary judgments as matters of law (App.

37, 38, 39, 40, 42, 44). Finally, the motion prayed the trial judge to "deny in their entirety" defendants' motions for summary judgment (App. 47). The trial judge denied the motion to reconsider (App. 27).

Petitioner gave written notice of appeal that included the denial of Petitioner's motion to reconsider grants of defendants' motions for summary judgments (App. 49). **TRAP Rule 25 Perfecting Appeals. 25.1 Civil Cases.** The Texas Rules of Appellate Procedure placed the burden on Petitioner to "secure a record sufficient to show reversible error" was committed by the trial judge ***Piotrowski v. Minns,*** 873 S.W.2d 368, 370 (Tex. 1993). **TRAP Rule 34 Appellate Record. 34.1 Contents. (b) Request for additional items.** Petitioner included his motion to reconsider (App. 35) and the trial judge's order denying the motion to reconsider (App. 27) in the appellate record before the Fourteenth Court of Appeals (App. 5 A. Mallios' Record on Appeal). Petitioner prepared his brief, (App. 51) in compliance with **TRAP Rule 38.1 Appellant's Brief**

Petitioner only briefed the trial judge's denial of his motion to reconsider (App. 54, last para.). Defendants filed responsive briefs asserting the appellate record was incomplete and inadequate because the record did not contain their motions for summary judgments (App. 6) and cited ***Enterprise Leasing Co. v. Barrios,*** 156 S.W.3d 547, 549-50 (Tex. 2004). The court there said "although Enterprise bears the burden to prove its summary judgment as a matter of law, on appeal Barrios bears the burden to bring forward the record of the summary judgment evidence to provide appellate courts with a basis to review his claim of harmful error" (App. 7). Petitioner contended in his reply brief that ***Enterprise*** "only required that an appellate record contain the 'pertinent summary judgment evidence considered by the trial judge'" not the actual motions for summary judgment and that the record contained all the pertinent summary judgment evidence considered by the judge (App. 8). In the written opinion, the court set out the content of the record before it, among other things: "Mallios' motion to reconsider appellees' motions for summary judgment with exhibits and the order denying Mallios' motion to reconsider wherein the trial judge stated he considered the motion to reconsider (App. 6). The Fourteenth's written opinion affirmed the trial judge based on defendants' motions for summary judgment not being in the record. They were not part of the record because they were not considered by the trial judge before he denied the motion to reconsider (App. 27).

Petitioner filed a motion for rehearing (App. 68) pointing out the court's refusal to exercise its jurisdiction and decide Petitioner's briefed point of error would prevent his right to a jury trial and would be an abuse of the court's discretion to refuse to examine the appellate record to determine if the trial judge abused his discretion because Defendants' motions for summary judgments were not contained in the record. That Petitioner had given written notice to Defendants that he would appeal the trial judge's order denying his motion to reconsider (App. 49, 69) and a copy of the designated record. Defendants had ample opportunity to supplement the record with anything they believed germane to whether the trial judge abused his discretion when the judge denied the motion to reconsider. The Fourteenth Court of Appeals overruled the motion for rehearing (App. 30).

Petitioner filed a petition for discretionary review to the Texas Supreme Court (App. 79) with appendix that listed the written opinion of the court of appeals; motion to reconsider defendants' grant of summary judgments, notice of appeal and designation of record (App. 91). The sole issue presented to the court was "appellate court refused to exercise its properly invoked jurisdiction and render a decision on appellant briefed point of error (App. 81). The petition also pointed out to the court it had jurisdiction to render a written opinion because it was a question of law ***Segrest v. Segrest,*** 649 S.W.2d 610, 612 (Tex. 1983) (App. 80).

The Texas Supreme Court denied the petition for discretionary review (App. 31). **TRAP Rule 56.1 Orders on Petition for Review (b) Petition Denied or Dismissed.** The supreme court acknowledged in its denial the court of appeals had not "correctly declare the law" but found the petition presented no error that required reversal or was not "of such importance to the jurisprudence of the state as to require correction."

Petitioner filed a motion for rehearing (App. 92) with Petitioner's brief (App. 101). The motion pointed out to the supreme court that the court of appeals had not rendered a written opinion on Petitioner's briefed point of error (App. 96). The motion also cited ***Light v. State,*** 15 S.W.3d 104, 105 (Tex.Crim.App. 2005), the Texas Criminal Court of Appeals required the court of appeals "to review every argument raised by a party that is necessary to the disposition of that appeal, *see* Tex.R.App. Proc. 47.1. . . . Failure by a court of appeals to address a point of error properly raised by a party requires remand for consideration of that point of error" (App. 96). The supreme court denied the motion for rehearing (App. 33). The supreme court again acknowledged the court of appeals did not "correctly declare the law" but the motion presented no error that required reversal or was not "of such importance to the jurisprudence of the state as to require correction."

The justices of the Fourteenth Court of Appeals' refusal to exercise the jurisdiction conferred under TRAP 25 and comply with TRAP 47.1 was not motivated by compliance with Texas Rules of Appellate Procedure; it was motivated by a "spirit of evasion for the purpose of defeating" Petitioner's federal right to a jury trial for the benefit of Defendants.

The written opinion of the justices of the Fourteenth Court of Appeals cited ***Enterprise*** for the court's holding, there, that "if the pertinent summary judgment evidence considered by the trial court is not included in the appellate record, an appellate court must presume that the omitted evidence supports the trial court's judgment" (App. 7). The written opinion confirmed the content of the appellate record (App. 5). The record contained the notice of appeal which invoked the court's jurisdiction over Petitioner and defendants. It also contained the trial judge's order denying the motion after the trial judge had considered the motion (App. 27).

When the justices of the Fourteenth Court of Appeals affirmed the trial judge's orders granting Defendants' summary judgments (App. 1) because their motions for summary judgments were not included in the appellate record which were not considered by the trial judge when he denied Petitioner's motion to reconsider, the justices were not motivated by the **TRAP Rule 34** and **TRAP Rule 38.1,** the justices were motivated by a "spirit of evasion for the purpose of defeating" Petitioner's federal right to a jury trial for the benefit of defendants.

The justices of the Fourteenth Court of Appeals were informed, by Petitioner's motion for rehearing (App. 68, 69), their jurisdiction was properly invoked and they would abuse the court's discretion if they refused to examine the appellate record to determine whether the trial judge abused his discretion when the trial judge denied the motion to reconsider because the defendants' motions for summary judgments were not contained in the record.

When the justices of the Fourteenth Court of Appeals overruled Petitioner's motion for rehearing, the justices were not motivated by **TRAP Rule 25.1** or the holding in ***Enterprise*** they used to support their written opinion; the justices were motivated by a "spirit of evasion for the purpose of defeating" Petitioner's federal right to a jury trial for the benefit of defendants.

The justices' of Texas Supreme Court denials of Petitioner's petition for discretionary review and motion for rehearing were not motivated by Texas state law or by the court's constitutionally mandated promulgation of rule of civil procedure necessary for the efficient and uniform administration of justice in the various courts; it was motivated by a "spirit of evasion for the purpose of defeating" Petitioner's federal right to a jury trial for the benefit of Defendants.

The Texas Supreme Court decided ***Cecil v. Smith:*** "*in* order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion"; ***Piotrowski v. Minns:*** the burden on Petitioner is to "secure a record sufficient to show reversible error" was committed by the trial judge; ***Enterprise Leasing Co. v. Barrios:*** only required that an appellate record contain the 'pertinent summary judgment evidence considered by the trial judge'; and ***Segrest v. Segrest:*** where the court of appeals did not exercise its jurisdiction to decide a question of law the Texas Supreme Court can invoke its jurisdiction and decide that question of law.

The Texas Criminal Court of Appeals held in ***Light v. State,*** the courts of appeals are required to review every argument raised by a party that is necessary to the disposition of that appeal. *See* Tex.R.App. Proc. 47.1(a). Failure by a court of appeals to address a point of error properly raised by a party requires remand for consideration of that point of error.

When the justices of Texas Supreme Court denied Petitioner's petition for discretionary review (App. 31) and in that denial acknowledged the court of appeals had not exercised its properly invoked jurisdiction to render an opinion on Petitioner's briefed point of error and refused to remand the case to the court of appeals, the justices were not motivated by Texas law which the Texas Supreme Court had developed. They were motivated by a "spirit of evasion for the purpose of defeating" Petitioner's federal right to a jury trial for the benefit of defendants.

The Texas Supreme Court under Texas' constitution is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts. The court promulgated **TRAP Rule 25 Perfecting Appeals 25.1 Civil Cases, Rule 34 Appellate Record, Rule 38.1 Appellant's Brief, Rule 47.1 Written Opinions** and **TRAP Rule 56.1 Orders on Petition for Review (b) Petition Denied or Dismissed.**

When the justices of the Texas Supreme Court denied Petitioner's motion for rehearing (App. 33) that pointed out to the justices that the court of appeals had refused to comply with **TRAP 47.1** promulgated by the Texas Supreme Court and when the justices acknowledged that error by their denial of the motion for rehearing, the justices were not motivated to carry out its Texas constitutional mandate to provide an efficient and uniform administration of justice in the various courts, the justices were motivated by a "spirit of evasion for the purpose of defeating" Petitioner's federal right to a jury trial for the benefit of defendants.

The judge of the 122nd District Court of Galveston County, Texas denial of Petitioner's motion to reconsider the grants of summary judgments to Defendants was not motivated by Texas law and Texas Rules of Civil Procedure; he was motivated by a "spirit of evasion for the purpose of defeating" Petitioner's federal right to a jury trial.

Petitioner, in his motion to reconsider, cited ***Rhone-Poulenc, Inc. v. Steel,*** 997 S.W.2d 217, 223, 224, (Tex. 1999) (App. 37). The Texas Supreme Court in ***Rhone-Poulenc*** established the burden of proof and the standard of review for granting summary judgment:

> **A. Burden of Proof.**
>
> Rule 166a provides a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine fact issue. *See Swilley v. Hughes,* 488 S.W.2d 64, 68 (Tex.1972). The party moving for summary judgment carries the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. *See* TEX.R. CIV. P. 166a(c) (fn2); *Wornick Co. v. Casas,* 856 S.W.2d 732, 733 (Tex.1993); *Nixon v. Mr. Property Mgt. Co.,* 690 S.W.2d 546, 548 (Tex.1985); *Calvillo v. Gonzalez,* 922 S.W.2d 928, 929 (Tex.1996). The nonmovant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense. *See Oram v. General Am. Oil Co.,* 513 S.W.2d 533, 534 (Tex.1974); *Swilley,* 488 S.W.2d at 67-68. The trial court may not grant summary judgment by default because the nonmovant did not respond to the summary judgment motion when the movant's summary judgment proof is legally insufficient. *See City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 678 (Tex.1979). The movant must establish its right to summary

judgment on the issues expressly presented to the trial court by conclusively proving all elements of the movant's cause of action or defense as a matter of law. *See Walker v. Harris,* 924 S.W.2d 375, 377 (Tex.1996); *Centeq Realty, Inc. v. Siegler,* 899 S.W.2d 195, 197 (Tex.1995); *City of Houston,* 589 S.W.2d at 678.

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense. *See Velsicol Chem. Corp. v. Winograd,* 956 S.W.2d 529, 530 (Tex.1997). When the plaintiff pleads the discovery rule as an exception to limitations, the defendant must negate that exception as well. *See Velsicol,* 956 S.W.2d at 530; *Burns v. Thomas,* 786 S.W.2d 266, 267 (Tex.1990); *Woods v. William M. Mercer, Inc.,* 769 S.W.2d 515, 518 n. 2. (Tex.1988).

B. Standard of Review

Summary judgments must stand on their own merits. Accordingly, on appeal, the nonmovant need not have answered or responded to the motion to contend that the movant's summary judgment proof is insufficient as a matter of law to support summary judgment. *See City of Houston,* 589 S.W.2d at 678. When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant. *See Science Spectrum, Inc. v. Martinez,* 941 S.W.2d 910, 911 (Tex.1997);

> *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex.1996); *Wornick,* 856 S.W.2d at 733. We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *See Science Spectrum, Inc.*, 941 S.W.2d at 911; *Friendswood Dev. Co.*, 926 S.W.2d at 282; *Wornick,* 856 S.W.2d at 733; *Nixon,* 690 S.W.2d at 548-49. On appeal, the movant still bears the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See Nixon,* 690 S.W.2d at 548.

When the judge of the 122nd District Court denied Petitioner's motion to reconsider that pointed out to the judge the defendants had not met their burden of proof and established as matters of law their entitlement to summary judgments and the judge had not applied that standard of review established by the Texas Supreme Court, in ***Rhone-Poulenc, Inc. v. Steel,*** and take as true all evidence favorable to Petitioner and indulge every reasonable inference and resolve any doubts in Petitioner's favor, the judge was not motivated by Texas law but was motivated by a "spirit of evasion for the purpose of defeating" Petitioner's federal right to a jury trial for the benefit of defendants.

◆

CONCLUSION

This Court must grant certiorari to correct an anathema to the Texas judicial system and repair the harm the jurists did to Texas and federal constitutions, Texas case law, Texas Rules of Civil and Appellate procedure and Texas and American jurisprudence. Petitioner complied with Texas case law, Texas Rules of Civil Procedure and the Rules of Appellate Procedure that were promulgated by the Texas Supreme Court. However, the jurists not only ignored the state and federal constitutions, Texas case law, Texas Rules of Civil and Appellate Procedures. They did much more. They abandoned their impartiality and actively involved themselves in this case to benefit the Defendants. The jurists' conduct put at risk the confidence every citizen in the state of Texas has in the fairness of Texas and American jurisprudence and the belief that every citizen who has a grievance may have that grievance resolved by a jury of peers. Their conduct was not motivated by a fair and impartial judicial system but was motivated by the "spirit of evasion for the purpose of defeating" Petitioner's federal right to a jury trial for the benefit of Defendants.

Petitioner prays the Court to grant certiorari, apply Texas law and render a written opinion that will provide Petitioner his constitutional right to a jury trial.

Respectfully submitted,

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[SEAL]

In the

Fourteenth Court of Appeals

NO. 14-06-00294-CV

CHRIS MALLIOS, Appellant

V.

STANDARD INSURANCE COMPANY,
FIRST FINANCIAL BENEFITS, INC.,
NULL LAIRSON, P.C., JIM YARBROUGH,
EDDIE BARR, EDDIE JANEK,
STEPHEN HOLMES, KEN CLARK,
AND PHILLIP LOHEC, Appellees.

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 04CV1063

MAJORITY OPINION

(Filed Aug. 30, 2007)

Appellant Chris Mallios appeals the trial court's grant of summary judgments in favor of appellees, contending that various appellees (1) failed to establish as a matter of law the affirmative defenses of limitations, res judicata, and collateral estoppel, (2) provided insufficient affidavits in support of no-evidence motions for summary judgment, and (3) failed to establish official immunity. Mallios also contends the trial court erred in denying his motion for summary judgment. We affirm.

Factual and Procedural Background

Our recitation of the factual background of the case is somewhat limited, because Mallios's record on appeal does not include (1) the appellees' motions for summary judgment and the supporting evidence, (2) Mallios's responses to the motions for summary judgment and any supporting evidence, or (3) any motion for summary judgment filed by Mallios.[1] However, we draw the following from Mallios's pleadings.

Mallios filed suit against Standard Insurance Company ("Standard"), First Financial Benefits, Inc. ("First Financial"), Null Lairson, P.C. ("Lairson"), members of the Galveston County Commissioner's Court Jim Yarbrough, Eddie Barr, Eddie Janek, Stephen Holmes, and Ken Clark (collectively, "Members"), and Phillip Lohec ("Lohec"), on behalf of himself and as a class representative, for alleged wrongdoing in connection with the group life insurance provided to Galveston County employees. In his petition, Mallios claimed that premium payments for the employees' term life insurance coverage were wrongly used to purchase a "membership interest" with the right to vote in Standard. Then, in 1999, Standard conveyed that interest back to the County for approximately $2.4 million, and the County allegedly used the money to pay a county liability instead of distributing it to the employees' retirement annuity accounts. Mallios claimed violations of Texas Insurance Code articles 3.50 and 21.21, violations of the Deceptive Trade Practices – Consumer Protection Act, and conspiracy.

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[1] The record does include Mallios's "Motion to Reconsider Grants of Defendants' Motions for summary Judgment" with exhibits. The exhibits purport to include affidavits filed in support of some of the motions for summary judgment.

Each of the defendants answered and asserted various defenses. Relevant here, Standard asserted numerous affirmative defenses, including the applicable statute of limitations, collateral estoppel, and res judicata, Mallios's lack of standing as a consumer, and defenses specific to Mallios's alleged Insurance Code violations. First Financial's answer raised similar defenses, including the affirmative defenses of the statute of limitations, res judicata, and collateral estoppel. Lairson asserted several affirmative defenses, including the statute of limitations, and also sought special exceptions, which were denied. Members asserted, among other things, official immunity from suit, the applicable statute of limitations, res judicata, and collateral estoppel. Lohec also asserted official immunity, the statute of limitations, and other defenses.[2]

Standard, First Financial, Lairson, the Members, and Lohec all moved for summary judgment, which the trial court granted. Mallios moved for reconsideration, but the trial court denied the motion. This appeal followed.

I. Analysis of Mallios's Appeal

On appeal, Mallios contends the trial court erred in granting appellees' motions for summary judgment, denying his motion for summary judgment. Mallios's complaints are presented in four categories. In the first category, Mallios contends the appellees failed to establish as a matter of law the affirmative defenses of limitations, res judicata, and collateral estoppel. In the second category, Mallios contends that affidavits supporting Lairson's and First Financial's no-evidence motions for summary judgment were nonspecific, conclusory, and contained admissions that supported Mallios's claims. In the third category, Mallios contends that Lohec failed to produce any summary judgment evidence to support his claim of official immunity. Finally, Mallios contends the trial court erred in denying his motion for summary judgment because, although the Members answered Mallios's original petition and filed amended answers to the original petition, their amended answers did not deny the allegations in Mallios's amended petition. Consequently, Mallios contends, the Members admitted all the essential elements of his claims and he was therefore entitled to summary judgment against Members.

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[2] On appeal, appellees contend their affirmative defenses of res judicata and collateral estoppel are supported by a previous lawsuit filed by Mallios's lawyer, Gerald Burks against the Members and Lohec. Mr. Burks sued in his capacity as Galveston County Treasurer and later, when he lost re-election, as an individual, in part complaining of the Commissioners Court's handling of the insurance money it received. *See Burks v. Yarbrough*, 157 S.W.3d 876, 881-82 (Tex. App. – Houston [14th Dist.] 2005, no pet.). This Court affirmed the summary judgments granted in favor of the appellees. *See id.* at 884.

In response, all of the appellees contend that the trial court's judgment must be affirmed because Mallios did not provide this Court with a complete record on appeal, and therefore we must presume the omitted documents support the trial court's orders granting summary judgment.

A. Mallios's Record on Appeal

1. The Record Before Us

The clerk's record contains Mallios's amended original petition, answers of each of the appellees, Null Lairson's special exceptions and the order denying them, five separate orders granting the motions for summary judgment of Standard, First Financial, Lairson, the Members, and Lohec,[3] Mallios's motion to reconsider appellees' motions for summary judgment with exhibits, the order denying Mallios's motion to reconsider, Mallios's notice of appeal, Mallios's designation of the record, and a few other documents not relevant here.

Significantly, although Mallios's designation of the record lists eighteen requested documents, Mallios did not request any of the summary judgment motions he challenges on appeal, nor did he request his responses to the motions or any supporting evidence. And, even though Mallios contends on appeal that the trial court erred in not granting his motion for summary judgment, he did not request this document be included in the record, either.

2. The Parties' Arguments Concerning the Record

As noted above, each of the appellees argue that, because Mallios brought forward an incomplete and inadequate record, he cannot prevail on appeal because we must presume the omitted documents support the trial court's grants of summary judgment.[4] Appellees contend this outcome is mandated

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[3] The trial court's orders granting summary judgment did not specify the grounds on which summary judgment was granted.

[4] Standard contends that its motions and supporting evidence exceed 500 pages. Similarly, First Financial contends it filed approximately 550 pages of evidence and numerous

(Continued on following page)

by *Enterprise Leasing Co. v. Barrios,* 156 S.W.3d 547, 549-50 (Tex. 2004) (per curiam), in which our Supreme Court affirmed a partial summary judgment on liability in favor of Enterprise in part because Barrios failed to provide the appellate court with a complete record to review. The Supreme Court explained that, "[a]lthough Enterprise bears the burden to prove its summary judgment as a matter of law, on appeal Barrios bears the burden to bring forward the record of the summary judgment evidence to provide appellate courts with a basis to review his claim of harmful error." *Id.* at 549 (citing *DeSantis v. Wackenhut Corp.,* 793 S.W.2d 670, 689 (Tex. 1990); *Escontrias v. Apodaca,* 629 S.W.2d 697, 699 (Tex. 1982)). The Court then instructed that "[i]f the pertinent summary judgment evidence considered by the trial court is not included in the appellate record, an appellate court must presume that the omitted evidence supports the trial court's judgment." *Id.* at 550 (citing *DeSantis,* 793 S.W.2d at 689). Applying this instruction, the Court thus presumed Barrios's answers to requests for admissions, which Enterprise relied on in part to support its motion, but which Barrios did not include in the appellate record, supported the trial court's partial summary judgment in favor of Enterprise. *Id.*

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affidavits. Lairson states that it filed affidavits and hundreds of pages of evidence supporting its motion for summary judgment.

In his reply brief responding to the appellees' assertion that *Enterprise* is fatal to Mallios's appeal, Mallios first argues that his record is sufficient because Texas Rules of Appellate Procedure 34.1 and 34.5 specify the contents of an appellate record, and motions for summary judgment and attached appendices or exhibits are not mentioned in the rules. Mallios also claims that *Enterprise* does not hold that the "actual motions for summary judgment" and attached appendices or exhibits must be included in the record; it only requires that an appellate record contain the "pertinent summary judgment evidence considered by the trial judge." Mallios contends the appellate record he presented contains all the pertinent summary judgment evidence required.

Additionally, Mallios objects to portions of the appellees' briefing. The appellees, in addition to complaining about the insufficiency of the appellate record, raise several substantive arguments to Mallios's appeal. The appellees contend, among other things, that Mallios failed to appeal all the grounds raised in support of their summary judgments. To support their contention, appellees include with their briefing appendices containing copies of their motions for summary judgment and other documents they assert are relevant to their arguments on the merits of the trial court's grants of summary judgment in their favor.[5] Mallios objects to the appendices containing motions for summary judgment and other documents as being outside of the appellate record, citing *Davis v. Huey,* 571 S.W.2d 859, 862 n.2 (Tex. 1978).

B. Our Resolution of the Parties' Arguments

Enterprise does not support Mallios's conclusion that *only* the "pertinent evidence" – not the motion for summary judgment or its attachments – is needed in the appellate record.[6] If anything, *Enterprise* illustrates how important it is for an appellant challenging a grant of summary judgment to include the complete summary judgment record considered by the trial court in ruling on the motion for summary judgment; otherwise, the appellate court may apply the presumption that the omitted documents support the trial court's judgment and affirm the grant of summary judgment on that basis. *See* 156 S.W.3d at 549-50; *see also Aguirre v. Vasquez,* 225 S.W.3d 744, 752 (Tex. App. – Houston [14th Dist.] 2007, no pet.). Further, *Enterprise* places the burden squarely on the party challenging the grant of summary judgment to ensure that all documents needed for this court to fully review the correctness of the summary judgment are in the record. *See Enterprise,* 156 S.W.3d at 549.

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[5] Additionally, Lairson's appendix includes amended and supplemental answers he contends were filed after the answer Mallios included in the record on appeal.

[6] Moreover, courts, including this one, have held that when an appellant contends the trial court erred in granting summary judgment, the complete summary judgment record, including the motion for summary judgment, must be included in the appellate record to overcome the presumption that the omitted evidence supports the trial court's judgment when the appellee objects to the omission. *See Atchison v. Weingarten Realty Mgmt.,* 916 S.W.2d 74, 76-77 (Tex. App. – Houston [1st Dist.] 1996, no pet.); *Chapman v. City of Houston,* 839 S.W.2d 95, 100-101 (Tex. App. – Houston [14th Dist.] 1992, writ denied).

We also reject Mallios's argument that he need not include the motions for summary judgment and exhibits in the appellate record because the Rules of Appellate Procedure do not require them to be included. Rule 34.1 does not aid Mallios because it merely provides that "[t]he appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record," and specifies that there should only be one appellate record in a case. *See* TEX. R. APP. P. 34.1. Rule 34.5, which lists the documents the trial court clerk must include in the clerk's record in the absence of a party's designation, does not specifically include motions for summary judgment. *See* TEX. R. APP. P. 34.5(a); *see also* TEX. R. APP. P. 35.3(a) (stating that it is the trial court clerk's responsibility to prepare, certify, and timely file the clerk's record). But, Rule 34.5 does not limit a party to those documents; rather, it permits any party to designate additional items to be included in the record. *See* TEX. R. APP. P. 34.5(b). Thus, although the trial court clerk is required to include at least the documents listed in Rule 34.5, per *Enterprise,* if a party wishes to successfully appeal a grant of summary judgment, he must include more than those documents the court clerk is required to include – he must include all "pertinent" documents the trial court considered in granting the motion. Otherwise, on appeal, the appellant would be unable to demonstrate that a genuine issue of material fact existed that precluded summary judgment in favor of the movant.

Based on the record before us, not only are we unable to review the evidence the appellees presented in support of their motions for summary judgment, but because we do not have the motions, we do not know what arguments appellees made that the evidence was intended to support. We do not know if the motions were traditional or no-evidence motions, so that we may review them appropriately. We do not have Mallios's responses to the motions for summary judgment (if any), so we cannot determine whether Mallios presented evidence that would have demonstrated that appellees were not entitled to summary judgments in their favor. We do not have Mallios's motion for summary judgment. We also cannot discern whether any party is attempting to raise on appeal an issue not expressly presented to the trial court. *See* TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal."). Finally, we cannot determine whether appellees correctly contend that Mallios did not address all possible grounds for summary judgment in this appeal.

This is not a case in which the appellant mistakenly failed to designate a document or did not immediately realize an important document was missing from the record. Mallios designated a record that omitted all of the summary judgment briefing and attached evidence. He has continued to take the position the documents were unnecessary even after all of the appellees argued in their responsive briefs that the omissions were fatal to his appeal. Mallios has not made any request to supplement the record.

Based on the state of the record before us, we overrule all of Mallios's issues and affirm the trial court's judgment.

II. Appellees' Requests for Sanctions

Appellees contend that Mallios should be subject to sanctions for bringing a frivolous appeal. *See* TEX. R. APP. P. 45. However, the fact that Mallios did not file a sufficient record for us to address his issues does not, alone, render his appeal frivolous. *See Sam Houston Hotel, L.P. v. Mockingbird Restaurant, Inc.*, 191 S.W.3d 720, 721 (Tex. App. – Houston [14th Dist.] 2006, no pet.). We note that Mallios's brief contains issues presented, record references, and legal authorities. Further, he filed a reply brief in response to appellees' briefs that included requests for sanctions. We decline to impose sanctions against Mallios.

III. Conclusion

We affirm the trial court's judgment.

/s/ Margaret Garner Mirabal
Senior Justice

Judgment rendered and Majority Opinion and Concurring and Dissenting Opinion filed August 30, 2007.

Panel consists of Justices Anderson, Frost, and Senior Justice Mirabal.[7] (Mirabal, J. Majority; Frost, J. Concurring and Dissenting).

CONCURRING AND DISSENTING OPINION

I join the court's analysis and disposition of the issues appellant Chris Mallios presents for review, but respectfully dissent as to the court's determination that appellate sanctions are not warranted.

Texas Rule of Appellate Procedure 45, entitled "Damages for Frivolous Appeals in Civil Cases," provides:

> If the court of appeals determines that an appeal is frivolous, it may – on motion of any party or on its own initiative, after notice and a reasonable opportunity for response – award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that

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[7] Senior Justice Margaret G. Mirabal sitting by assignment.

> does not appear in the record, briefs, or other papers filed in the court of appeals.

TEX. R. APP. P. 45. Appellees Standard Insurance Company, First Financial Benefits, Inc., Null Lairson, P.C., Jim Yarbrough, Eddie Barr, Eddie Janek, Stephen Holmes, and Ken Clark each have invoked Rule 45, seeking "just damages" against Mallios for filing a frivolous appeal.

The Supreme Court of Texas has not yet addressed the appropriate legal standard appellate courts should use to determine whether to assess appellate sanctions. Under Rule 45, the appellate court first must determine that an appeal is "frivolous" before it can consider awarding "just damages" to any prevailing party. Most courts of appeals agree that, after the court determines that this prerequisite is satisfied, whether the court should award "just damages" is a matter of discretion that courts exercise with prudence and caution, after careful deliberation and only under truly egregious circumstances.[1] However, there is a conflict among the courts of appeals as to how courts should make the preliminary determination whether an appeal is frivolous. The rule contains no definition of "frivolous," and courts of appeals have asserted at least three different legal standards[2] for determining whether this prerequisite has been satisfied:

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[1] *See Conseco Fin. Servicing v. Klein Indep. Sch. Dist.*, 78 S.W.3d 666, 676 (Tex. App. – Houston [14th Dist.] 2002, no pet.); *Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App. – Houston [1st Dist.] 2001, pet. denied) (en banc).

(1) Some courts consider the only prerequisite to be that there are no reasonable grounds to believe that an appellate court would reverse the trial court's judgment, objectively considering the record from the viewpoint of an attorney representing the appellant. These courts do not require any determination that the appellant has acted in bad faith.[3]

(2) Some courts require that the appeal be both objectively frivolous and subjectively brought in bad faith or for purposes of delay.[4]

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[2] Part of the confusion appears to stem from a failure to focus on the differences between the language in former Rule of Appellate Procedure 84 and current Rule 45. *See Smith,* 51 S.W.3d at 380-81.

[3] *See Elwell v. Mayfield,* No. 10-04-00322-CV, 2005 WL 1907126, at *7 (Tex. App. – Waco Aug. 10, 2005, pet. denied) (mem. op.); *Smith,* 51 S.W.3d at 380-82; *Lloyd v. Whitmire,* No. 09-02-0148-CV, 2003 WL 1738784, at *1 (Tex. App. – Beaumont Apr.3, 2003, no pet.) (mem. op.); *Mid-Continent Cas. Co. v. Safe Tire Disposal Corp.,* 2 S.W.3d 393, 396-97 (Tex. App. – San Antonio 1999, no pet.).

[4] *See Azubuike v. Fiesta Mart, Inc.,* 970 S.W.2d 60, 66 (Tex. App. – Houston [14th Dist.] 1998, no pet.); *Faddoul, Glasheen & Valles, P.C. v. Oaxaca,* 52 S.W.3d 209, 213 (Tex. App. – El Paso 2001, no pet.); *Keever v. Finlan,* 988 S.W.2d 300, 315 (Tex. App. – Dallas 1999, pet. dism'd); *Duran v. Resdoor Co.,* 977 S.W.2d 690, 693 (Tex. App. – Fort Worth 1998, pet. denied

(3) Some courts state that appellate sanctions may be imposed if the appeal is either objectively frivolous **or** brought in bad faith.[5]

Absent (a) an intervening decision from the Supreme Court of Texas or this court sitting en banc that is on point and contrary to the prior panel decisions or (b) an intervening and material change in the statutory law, this court is bound by the decisions of prior panels of this court that have adopted the second rule above.[6] Since the *Azubuike* decision, decided shortly after the 1997 amendments to the Texas Rules of Appellate Procedure, Rule 45 has not been changed, and there have been no decisions by the Supreme Court of Texas or this court sitting en banc addressing this issue. *See Azubuike v. Fiesta Mart, Inc.*, 970 S.W.2d 60, 66 (Tex. App. – Houston [14th Dist.] 1998, no pet.) (denying request for Rule 45 sanctions because record did not show that appeal was frivolous and brought for the purpose of delay).

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[5] *See In re Estate of Davis*, 216 S.W.3d 537, 548 (Tex. App. – Texarkana 2007, pet. denied); *Njuku v. Middleton*, 20 S.W.3d 176, 178 (Tex. App. – Dallas 2000, pet. denied); *Diana Rivera & Assocs., P.C. v. Calvillo*, 986 S.W.2d 795, 799 (Tex. App. – Corpus Christi 1999, pet. denied).

[6] *See D'Arcy v. Mead*, No. 14-04-01220-CV, 2006 2165733, at *3 (Tex. App. – Houston [14th Dist.] Aug. 1, 2006, pet. denied) (mem. op.); *City of Webster v. City of Houston*, No. 14-04-00353-CV, 2005 913813, at *1 (Tex. App. – Houston [14th Dist.] Apr. 19, 2005, no pet.) (mem. op.); *Barker CATV Const., Inc. v. Ampro, Inc.*, 989 S.W.2d 789, 793 n. 2 (Tex. App. – Houston [1st Dist.] 1999, no pet.); *United States v. Treft*, 447 F.3d 421, 425 (5th Cir. 2006).

Therefore, this court must follow *Azubuike* and subsequent cases from this court that require the appeal to be both objectively frivolous and subjectively brought in bad faith or for purposes of delay before sanctions may be imposed under Rule 45.[7]

Are there reasonable grounds to believe that this court would reverse the trial court's judgment, objectively considering the record from the viewpoint of an attorney representing the appellant?

The appellees moving for sanctions allege the appeal is frivolous because Mallios did not arrange for the filing of a sufficient appellate record. Under Texas Rule of Appellate Procedure 34.5, the trial court clerk is not required to include in the clerk's record copies of any motion for summary judgment, summary-judgment response, or summary-judgment evidence, unless a party specifically requests in writing that a copy of any such item be included in the clerk's record. *See* TEX. R. APP. P. 34.5. No party, including Mallios, has ever requested that the district court clerk include in the clerk's record copies of any motion for summary judgment, summary-judgment response, or summary-judgment evidence. None of those items have been included in our appellate record. In his thirteen-page opening brief, Mallios asserts the following:

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[7] *See Yazdchi v. Chesney,* No. 14-05-00817-CV, 2007 237697, at *2 & n. 6 (Tex. App. – Houston [14th Dist.] Jan. 30, 2007, no pet.) (mem. op.) (noting the first rule above but holding that this court requires the appeal to be both objectively frivolous and subjectively brought in bad faith or for purposes of delay before Rule 45 sanctions may be assessed).

- Mallios requests the court to find that the trial court erred in granting **appellees' motions for summary judgment** and in denying **Mallios's motion for summary judgment**.
- In reviewing a trial court's summary judgment, this court must determine whether the **summary-judgment proof** establishes as a matter of law that appellees are entitled to judgment in their favor.
- Standard's **summary-judgment evidence** did not establish as a matter of law its statute-of-limitations defense.
- Standard's **summary-judgment evidence** did not establish res judicata or collateral estoppel as a matter of law.
- The **summary-judgment affidavit** filed by appellee Null Lairson, P.C. was insufficient as a matter of law, and the trial court erred in granting summary judgment based on it.
- The **summary-judgment affidavit** filed by First Financial was insufficient as a matter of law.
- Appellee Phillip Lohec did not produce **any summary-judgment evidence**

> proving his defense of official immunity, and the trial court erred in granting summary judgment in his favor.
>
> In his **motion for summary judgment**, Mallios asked the trial court to declare as a matter of law that "the Alternate Plan, Group Policy 602107, Insurance Code and the Demutualization Plan made certain representations to [Mallios]." **These documents** were before the trial court **without objection**.

None of the items emphasized in boldface type above are contained in our record. In response to Mallios's opening brief, appellees Standard, First Financial, Null Lairson, P.C., Yarbrough, Barr, Janek, Holmes, and Clark all asserted that this court should order Mallios to pay their appellate attorney's fees as "just damages" under Rule 45 because, among other things, Mallios did not arrange for the filing of a sufficient appellate record. Without requesting that the district clerk supplement the clerk's record, the appellees attached copies of their motions for summary judgment to their appellate briefs.

In his reply brief, Mallios did not address the Rule 45 sanctions issue, and he did not ask this court to deny the requests for sanctions. Instead, Mallios stated that, although he has the burden to present a complete record on appeal, a "complete record" is only the pertinent summary-judgment evidence considered by the trial court. Mallios asserted that, under *Enterprise Leasing Co. v. Barrios,* a "complete record" does not include the actual motions for summary judgment and their attached evidence. *See* 156 S.W.3d 547, 549-50 (Tex. 2004) (per curiam). In *Barrios*, the Supreme Court of Texas stated that, "although [the appellee/movant] bears the burden to prove its summary judgment as a matter of law, on appeal [the appellant/non-movant] bears the burden to bring forward the record of the summary judgment evidence to provide appellate courts with a basis to review his claim of harmful error . . . If the pertinent summary judgment evidence considered by the trial court is not included in the appellate record, an appellate court must presume that the omitted evidence supports the trial court's judgment." *Barrios*, 156 S.W.3d at 550. Mallios has not brought forward an appellate record containing the summary-judgment motions or the summary judgment evidence considered by the trial court. Mallios's argument that he has discharged his burden under *Barrios* is objectively frivolous.

There are no reasonable grounds to believe that an appellate court would reverse the trial court's judgment in the absence of a complete record, objectively considering the record from the viewpoint of an attorney representing Mallios. The arguments made in Mallios's opening brief are therefore objectively frivolous.[8]

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[8] *See Tate v. E.I. Du Pont de Nemours & Co.*, 954 S.W.2d 872, 875 (Tex. App. – Houston [14th Dist.] 1997, no writ) (assessing appellate sanctions against a party appealing a summary judgment based on her failure to request the inclusion in the

(Continued on following page)

Did the appellant bring this appeal in bad faith?

When confronted in the appellees' briefs with his failure to request an appellate record sufficient for this court to review the trial court's summary-judgment rulings, Mallios did not concede any shortcomings; rather, in his reply brief, he asserted another objectively frivolous argument, taking the untenable position that these documents were unnecessary to the resolution of his appeal. In addition, in his reply brief, Mallios objected to the appellees' attachment of copies of their motions for summary judgment to their appellate briefs because these documents are not contained in the appellate record. Though Mallios is correct that this court cannot consider these documents because they are not contained in the appellate record,[9] his objection on this ground is outrageous because (1) it was his burden to put those documents properly before the court and (2) he failed to do so. Rather than requesting that these omitted, and apparently voluminous, items be added to the record in the correct form, Mallios objected to the presence of some of these documents in this court in an improper form. These actions, under these

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record of one of the summary-judgment motions granted by the trial court, along with the motion's accompanying evidence).

[9] *See Bencon Mgmt. & Gen. Contracting, Inc. v. Boyer, Inc.*, 178 S.W.3d 198, 210 (Tex. App. – Houston [14 Dist.] 2005, no pet.).

circumstances, bespeak improper motivation and purpose.

If Mallios had requested the district clerk to file a supplemental clerk's record containing the apparently voluminous summary-judgment motions, evidence, and responses and if Mallios were to lose this appeal, then Mallios would bear the expense of the preparation of this record. *See* TEX. R. APP. P. 43.4. Mallios not only importuned this court to reverse the trial court's judgment without reviewing the summary-judgment record but to do so in manner that would allow him to avoid the full amount of appellate costs that he would be required to pay if he had requested that all necessary documents be included in the clerk's record. Mallios's refusal to acknowledge that the summary-judgment motions, responses, and evidence are necessary to adjudicate this appeal, and his objection to this court's consideration of the appellees' summary-judgment motions because they are not in the appellate record show that Mallios is acting in bad faith and seeking to harass appellees through this appeal. *See Tate*, 954 S.W.2d at 875.

Should this court exercise its discretion to sanction the appellant?

Once a determination is made that the prerequisites to Rule 45 sanctions have been satisfied, the focus of the inquiry turns to whether it is appropriate under the facts of this case for the court to exercise its discretion to award just damages to the prevailing parties. In making this determination, this court considers the circumstances revealed by the record, briefs, and other papers filed in this court, and weighs factors that include the following:

- the failure to present a complete record,
- the raising of issues for the first time on appeal, even though preservation of error was required in the trial court,
- the failure to file a response to a request for appellate sanctions, and
- the filing of an inadequate appellate brief.

See id. Mallios has not presented a complete record. He appeals the granting of five different motions for summary judgment and the denial of his motion for summary judgment, yet Mallios has not requested the district clerk to include any of these motions, their attached evidence, or any summary-judgment responses in the clerk's record. Although Mallios did request a copy of his motion to reconsider, this motion asserts that the trial court should not have granted the five motions for summary judgment, upon reconsideration should deny them, and should grant Mallios's motion for summary judgment. Obviously, to evaluate the merits of the motion to reconsider, this court would need to review the five motions for summary judgment the trial court granted, Mallios's motion for summary judgment, and any responses to these motions. Again, Mallios has not requested that any of these items be made a part of the appellate record. Moreover, Mallios's failure to do so is not an oversight or an innocent matter that escaped his notice but a substantial defect that was brought to his attention in many ways and by many sources.

In three appellees' brief and in one motion for sanctions, various appellees requested Rule 45 sanctions against Mallios. Mallios has not filed any response to this motion or to any of these requests for sanctions. Mallios did file a reply brief; however, in that brief, Mallios did not present any argument as to whether Rule 45 sanctions should be assessed and he did not ask this court to deny the requests for sanctions. Although, as noted by the majority, Mallios did file a thirteen-page appellant's brief with citations to the record and to legal authorities, for the reasons noted, this brief presents objectively frivolous arguments. Mallios also filed a reply brief, in which he added an additional frivolous argument that he satisfied his burden of requesting that the clerk include in the record all pertinent summary-judgment evidence considered by the trial court, even though he requested no summary-judgment evidence.

In declining to impose Rule 45 sanctions, the majority relies on *Sam Houston Hotel, L.P. v. Mockingbird Restaurant, Inc.,* 191 S.W.3d 720, 721 (Tex. App. – Houston [14th Dist.] 2006, no pet.). In *Sam Houston Hotel,* this court stated that:

- The appellee contended the appellant should be sanctioned for failing to arrange for the filing of a reporter's record and for mischaracterizing the evidence presented at trial.

- Appellant's failure to arrange for a sufficient record does not necessarily make its appeal frivolous.
- In the absence of a reporter's record, this court could not determine whether appellant had mischaracterized the evidence at trial.
- This court declined to impose sanctions under Rule 45.

Sam Houston Hotel, L.P., 191 S.W.3d at 721. If the *Sam Houston Hotel* court concluded that the appeal was not frivolous, then it would have had no discretion as to whether to assess Rule 45 sanctions, and it would not have been in a position to "decline to impose sanctions." *See id.* The *Sam Houston Hotel* court appears to have focused on the appellee's failure to assert that the appeal was frivolous, noting that an assertion that the record is inadequate to address the issues is not the same as an assertion that the appeal is frivolous. *See id.* The court then stated that it exercised its discretion not to award sanctions and did not discuss the facts and circumstances in the record upon which that decision was based. *See id.* The *Sam Houston Hotel* court did not say that an appellant's failure to request an appellate record sufficient to review the appellate issues can never make an appeal frivolous. *See id.* Indeed, such a holding would be contrary to this court's precedent. *See Ward v. Lubojasky,* 777 S.W.2d 156, 157 (Tex. App. – Houston [14th Dist.] 1989, no writ) (stating, in assessing appellate sanctions, that "[s]ufficient cause is obviously lacking, for we can hardly review evidence without a record"). The *Sam Houston Hotel* case is distinguishable.

For the reasons stated above, considering the record, briefs, and other papers filed in this court, Mallios's appeal is objectively frivolous and subjectively brought in bad faith or for purposes of delay. Furthermore, after careful deliberation and exercising discretion under Rule 45 with prudence and caution, this court should conclude based on the above facts that this case presents egregious circumstances warranting imposition of Rule 45 sanctions. The court should order Mallios to pay the reasonable and necessary appellate attorney's fees of Standard, First Financial, Null Lairson, P.C., Yarbrough, Barr, Janek, Holmes, and Clark. *See Tate,* 954 S.W.2d at 875. Because the court does not do so, I respectfully dissent.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Majority Opinion and Concurring and Dissenting Opinion filed August 30, 2007.

Panel consists of Justice Anderson, Justice Frost, and Senior Justice Mirabal.[10] (Mirabal, J. Majority; Frost, J. Concurring and Dissenting).

---

[10] Senior Justice Margaret G. Mirabal sitting by assignment.

CAUSE NO. 04-CV-1063

CHRIS MALLIOS and	§	**IN THE DISTRICT**
ROBBIE YANCY	§	**COURT OF**
Plaintiffs	§	
	§	
VS.	§	**GALVESTON**
STANDARD INSUR-	§	**COUNTY, TEXAS**
ANCE COMPANY,	§	
FIRST FINANCIAL,	§	
INC., NULL LAIRSON,	§	**122ND JUDICIAL**
P.C., JIM YARBROUGH,	§	**DISTRICT**
EDDIE BARR, EDDIE	§	
JANEK, STEPHEN	§	
HOLMES, KEN CLARK	§	
AND PHILIP LOHEC	§	
	§	
Defendants	§	

ORDER DENYING PLAINTIFFS' MOTION TO RECONSIDER GRANTS OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

On this day came on to be considered Plaintiff Chris Mallios' Motion to Reconsider the Granting of Defendants' Motions for Summary Judgment previously filed and the Court, after reviewing Plaintiff's Motion, the response filed by Defendants, and hearing the argument of counsel, is of the opinion that Plaintiff's Motion is not well-taken and should be in all things **DENIED**.

IT IS THEREFORE ORDERED that Plaintiff Chris Mallios' Motion to Reconsider the Granting of

Defendants' Motions for Summary Judgment is **DENIED**.

SIGNED on March 24, 2006.

/s/ John Ellison
JUDGE PRESIDING

[SEAL]

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

[Names And Phone Numbers Omitted In Printing]

Thursday, October 11, 2007

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RE: Court of Appeals Number: 14-06-00294-CV
Trial Court Case Number: 04CV1063

Style: Chris Mallios
v.
Standard Insurance Company, Et Al

Please be advised that on this date the Court **OVERRULED** appellant's motion for rehearing in the above cause.

ED WELLS, CLERK

By ________________________
Deputy

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
[SEAL] **(512) 463-1312**

January 11, 2008

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Mr. Ervin A. Apffel Jr.
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& Apffel, P.C.
P. O. Box 629
Galveston, TX 77553

RE: Case Number: 07-0898
Court of Appeals Number: 14-06-00294-CV
Trial Court Number: 04CV1063

Style: CHRIS MALLIOS
v.
STANDARD INSURANCE COMPANY, ET AL.

Dear Counsel:

Today the Supreme Court of Texas denied as corrected the petition for review in the above-referenced case.

Sincerely,

/s/ Blake A. Hawthorne
Blake A. Hawthorne, Clerk

by Claudia Jenks,
Chief Deputy Clerk

cc: Ms. Latonia Renee Wilson
Mr. Ed Wells

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
[SEAL] **(512) 463-1312**

February 29, 2008

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Galveston, TX 77553

RE: Case Number: 07-0898
Court of Appeals Number: 14-06-00294-CV
Trial Court Number: 04CV1063

Style: CHRIS MALLIOS
v.
STANDARD INSURANCE COMPANY, ET AL.

Dear Counsel:

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

Sincerely,

/s/ Blake A. Hawthorne
Blake A. Hawthorne, Clerk

by Claudia Jenks,
Chief Deputy Clerk

cc: Ms. Latonia Renee Wilson
Mr. Ed Wells

Cause 04CV1063

CHRIS MALLIOS and	: IN THE 122nd
ROBBIE YANCY	: DISTRICT COURT
Plaintiff	:
VS.	:
	:
STANDARD INSURANCE	:
COMPANY, FIRST	:
FINANCIAL, INC,	: OF
NULLΔLAIRSON, P.C.,	:
JIM YARBROUGH,	:
EDDIE BARR, EDDIE	:
JANEK, STEPHEN	:
HOLMES, KEN CLARK	:
AND PHILLIP LOHEC	: GALVESTON CTY,
Defendants	: TEXAS

Plaintiff's Motion to Reconsider Grants of Defendants' Motions for Summary Judgment

(Filed Feb. 1, 2006)

TO THE HONORABLE JUDGE OF SAID COURT:

Comes Chris Mallios, Plaintiff, in the above and entitled cause, and respectfully request the Court to reconsider its grants of summary judgments for Defendants, Standard Insurance Company, First Financial Benefits, Inc. NullΔLairson, P.C., Members and Phil Lohec for the reasons that they have not proved as a matter of law the affirmative defenses; the other defenses raised in their motions were raised in motions for special exception and the Court denied those motions and did not require Mr. Mallios to replead his amended original petition.

The purpose of the summary judgment procedure is to permit the trial court to promptly dispose of cases that involve unmeritorious claims or untenable defenses. It is not to deprive litigants of their right to a trial by jury or to try a case by affidavit and deposition testimony. **Collins v. County of El Paso, 954 S.W.2d 137, 145 (Tex.App. - El Paso 1997, pet. Denied)**

Standard Insurance Company	**2**
NullΔLairson	**5**
Members	**6**
Phillip Lohec	**8**
First Financial Benefits, Inc.	**9**
Plaintiff Chris Mallios	**10**

Defendant Standard Insurance Company

On January 27, 2006 the court after considering Defendant Standard Insurance Company's motion for summary judgment and Mr. Mallios' response, ordered the motion granted in its entirety and ordered Mr. Mallios take nothing by reason of his claims against Defendant.

The burden is upon Standard to establish its entitlement to affirmative defenses as a matter of law. If Mr. Mallios is able to raise a fact issue on any element necessary to establish the affirmative defense, the affirmative defense is not a matter of law but a matter of fact to be determined by a jury. **Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 223, 224, (Tex.1999)**

Statute of Limitations

Standard supported its argument no motion for summary judgment "material undisputed facts". (Attached as Exhibit A)

Mr. Mallios asserted in his amended original petition that he discovered, between 2003 and 2004, Group Policy 602107 was misrepresented, breach of express and implied warranties and failure to disclose that his premium payments were used to make an investment in Standard's surplus for the benefit of Galveston County. Standard, however, in its motion for summary judgment, asserted Mr. Mallios injury was that he did not receive notice of what happen to demutualization funds and since mention of demutualization funds was contained in county records the discovery rule did not apply.

Standard cited **HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex.1996)** where the Texas Supreme Court held that when the allegation is failure to give "notice" an examination of county records does convey constructive notice and that statute of limitation begins to run when the injury occurred.

In **Ojeda de Toca v. Wise, 748 S.W.2d 449, 450 (Tex.1988)** the Texas Supreme Court held that when the allegation is a violation of DTPA or fraud an examination of county records does not convey constructive notice of the violation of DTPA or fraud. The statute of limitations does not being to run until the violation or fraud is detected or should have been detected by plaintiff.

Whether the injury here is a violation of DTPA, misrepresentation of Group Policy 602107 or notice is a fact question which must be determined by a jury.

Res Judicata

Mr. Mallios brought a cause of action for violation of DTPA and misrepresentation of Group Policy 602107.

Standard used its motion for summary judgment "material undisputed facts", "prior lawsuit" petition and "prior lawsuit" order granting summary judgment to assert res judicata barred Mr. Mallios' cause of action. (Attached as Exhibit B)

Standard argued there is privity because "both lawsuits, the county treasurer's interest and the interests of Galveston County employees were, according to Burks' allegations are one and the same – to make sure the demutualization funds were distributed properly." Standard argued the "prior lawsuit" is a final judgment by a court of competent jurisdiction and the county's use and disbursement of the demutualization funds are issues in Mr. Mallios's lawsuit which could have been raised in the prior lawsuit.

Standard offered no summary judgment evidence to show "the county treasurer's interest and the interest of Galveston County employees were according to Burks' allegations are one and the same – to make sure the demutualization funds were distributed properly. Standard offered no summary judgment evidence to show "the county's use and disbursement of the demutualization funds are issues in Mr. Mallios' lawsuit which could have been raised in the prior lawsuit.

Here, whether the "prior lawsuit" and "prior lawsuit" order granting summary judgment satisfy the elements of res judicata and establishes a violation of a public consideration that underlines res judicata are not questions of law but questions of fact which must be determined by a jury.

Collateral Estoppel

Standard argued the use of the demutualization funds was fully and fairly litigated in the prior lawsuit. Galveston County's receipt and use of the demutualization funds were facts that were essential to the judgment in the prior lawsuit. The issue was adjudicated on behalf of the county employees by the county treasurer in a representative capacity. Standard offered no summary judgment evidence to support its argument.

The summary judgment was granted in the "prior lawsuit" because plaintiff, there, lost standing and was not able to invoke the district court's jurisdiction to consider any issues raised there. The evidence Standard offered "material undisputed facts", "prior lawsuit" and "prior lawsuit" order of summary judgment established, as a matter of law, that no issue in the present lawsuit was fully and fairly litigated in the "prior lawsuit".

Defendant Null∆Lairson, P. C.

On January 27, 2006 the Court after considering the response, the pleadings, the evidence on file with the court, the affidavits, and arguments of counsel, ordered Defendant Null∆Lairson's motion granted and Mr. Mallios take nothing with a dismissal with prejudice.

Null∆Lairson raised the same affirmative defenses raised by Standard. Asserted that as a professional, DTPA did not apply to it and raised issues concerning Mr. Mallios' standing, cause of action and notice. Additionally, it asserted that Mr. Mallios cause of action was one in negligence.

Null∆Lairson made the same arguments, for the affirmative defenses, as Standard made. Mr. Mallios adopts the arguments made, against Standard, against Null∆Lairson.

Null∆Lairson filed a motion for special exceptions to advance its arguments of standing, cause of action, notice and non applicability of DTPA to professionals. Mr. Mallios' responded to the motion for special exceptions. The Court denied Null∆Lairson's motion and did not require Mr. Mallios to re-plead his amended original petition. Summary judgment should not be granted in this instance because the Court did not order Mr. Mallios to re-plead his amended original petition. **Natividad v. Alexis, Inc. 875 S.W.2d 695, 699 (Tex.1994)**

In Null∆Lairson's motion for summary judgment it argued Mr. Mallios has not designated an expert and that its expert established a "standard of care" which was not breached. The "standard of care" is an issue if cause of action was one in negligence. Mr. Mallios cause of action are violation of DTPA and misrepresentation of Group Policy 602107. Null∆Lairson summary judgment evidence did not demonstrate the need for an expert to prove Mr. Mallios' cause of action.

DTPA does not apply to a professional when it is rendering an opinion, judgment, or advice. However, a professional can be sue under DTPA for 1) express misrepresentations of material facts that cannot be characterized as advice, judgment or opinion; 2) failure to disclose know information in violation of section 17.46(b)(23); 3) unconscionable actions or courses of action that cannot be characterized as advice, judgment or opinion; or 4) breaches of an express warranty that cannot be characterized as advice, judgment, or opinion. **Latham v. Castillo, 972 S.W.2d 66, 68 n.2 (Tex.1998)**

Mr. Mallios' amended original petition alleged Null∆Lairson failure to disclose Mr. Mallios' premium payments were used to purchase an entity interest in Standard Insurance Company for the benefit of Galveston County. Null∆Lairson's affidavit provided the following from its expert:

> Charles G. Yaple, CPA, a partner at Null∆Lairson
>
> Null Lairson, P.C. was not required to report the **fact** that Galveston County was purchasing insurance products from a mutual insurance company or that Galveston County was a member of the mutual insurer Standard Insurance Company under any accounting standard or other reporting requirement." (Exhibit C)

Whether Null∆Lairson's summary judgment evidence proves Mr. Mallios' cause of action is negligence and its expert affidavit is advice, opinion, judgment or failing to disclose are questions for the jury not the Court.

Defendant Members

On January 27, 2006 the court after considering Defendants Yarbrough, Barr, Janek, Holmes and Clark motion for summary judgment and Mr. Mallios's response, ordered the motion granted in its entirety and ordered Mr. Mallios take nothing by reason of his claims against Yarbrough, Barr, Janek, Holmes and Clark.

Members of Galveston County Commissioners' Court, as the governing body of Galveston County, are not a party in this lawsuit. Defendant Members of Galveston County Commissioners' Court as Trustee of the Alternate Plan is a party to this lawsuit.

In April of 2005, Mr. Mallios amended his original petition and alleged conspiracy. In that amended petition Members, as they were in the original petition, are alleged to have violated their fiduciary duties as Trustees of the Alternate Plan not as the governing body of Galveston County. In June of 2005, Members filed "their Third Amended Original Answer to Mr. Mallioss' Original Petition on file herein". (Exhibit D)

Under the TRCP 65, when Mr. Mallios amended his original petition, the original petition "shall no longer be regarded as a part of the pleading in the record of the cause". Defendant Members' third amended original answer to Mr. Mallios's original petition was a response to a pleading that was no longer a part of the record.

Defendant Members did not file a general denial against Mr. Mallios' amended original petition and therefore did not put at issue any of the matters contained in Mr. Mallios' amended original petition. **Shell Chem. Co. v. Lamb, 493 S.W.2d 742, 744 (Tex.1973), TRCP 92.** Further there was no preceding pleading that entitled Defendant Members to plead any affirmative defenses. **Kinnear v. Texas Comm'n Human Rights, 14 S.W.3d 299, 300 (Tex.2000), TRCP 94**

Mr. Mallios objects to un-plead defenses raised in Defendant Members' second motion for summary judgment. **Roark v. Stallworth Oil & Gas, Inc. 813 S.W.2d 492, 495 (Tex.1991)**

Defendant Phillip Lohec

On January 27, 2006, the Court after considering Defendant Lohec's motion for summary judgment ordered it granted and Mr. Mallios' claims against Lohec dismissed with prejudice.

Lohec raised the same affirmative defenses raised by Standard. Lohec also raised official immunity as well as issues concerning Mr. Mallios' standing, cause of action, and notice. Lohec made the same arguments for the affirmative defenses, except official immunity, Standard made. Mr. Mallios adopts the arguments, made against Standard, against Lohec.

Lohec filed a motion for special exceptions to advance his arguments of standing, cause of action and notice. Mr. Mallios' responded to the motion for special exceptions. The Court did not require Mr. Mallios to re-plead his amended original petition. Summary judgment should not be granted because the Court did not order Mr. Mallios to re-plead his amended original petition.

Lohec advanced the affirmative defense of official immunity. Lohec did not produce summary judgment evidence to show what his "official acts" were in connection with the Alternate Plan and Group Policy

602107. Lohec did not produce summary judgment evidence of his discretionary function as it related to the Alternate Plan and Group Policy 602107. Lohec did not produce summary judgment evidence of his acts of good faith as those acts related to the Alternate Plan and Group Policy 602107. Lohec did not produce summary judgment evidence as to the source of his "course and scope" of his involvement with the Alternate Plan and Group Policy 602107.

Whether Lohec is entitled to the affirmative defense of official immunity is a question of fact to be determined by a jury.

Defendant First Financial Benefits, Inc.

Mr. Mallios did not receive the Court ruling on Defendant First Financials motion for summary judgment. However, Mr. Mallios advances the same argument he advance against Defendant Standard's motion for summary judgment.

Mr. Mallios asserted in his amended original petition that Insurance Code art 3.50 made the following represented to him

> any monies or credits received by or allowed to the policyholder pursuant to any participation agreement . . . issued in connection with the policy shall be applied to the payment of future premiums and to the pro rata abatement of the insured employee's contribution thereof

Defendant First Financial provided an affidavit of Rich Gornot, President and CEO of First Financial that read as follows

> 11. "After the meeting, First Financial sent correspondence to the committee outlining two other options." (Exhibit E, affidavit)

A letter from the legal department of Galveston County to Defendant Members read:

> Subsequent to this meeting the committee received correspondence from First Financial which added two other options. The first was infusing more cash into the retired life reserve plan or using the Standard monies. The second was to use the funds to pay Standard premiums. Doing so would enable the County to make additional contributions for approximately 27 months into each employees deferred compensation account. (Exhibit E, letter)

Mr. Mallios asserted in his amended original petition that the Alternate Plan represented to him that First Financial was the plan administer in charge of maintaining and controlling the assets of the Alternate Plan.

Plaintiff Chris Mallios

Mr. Mallios request the Court to grant his motion for partial summary judgment substitution in its entirety. Mr. Mallios asserts that, as a matter of law, the Alternate Plan, Group Policy 602107, Insurance

Code and the Demutualization Plan made certain representations to him.

Prayer

Wherefore Mr. Mallios prays the Court to reconsider and grant his motion for partial summary judgment substitution and deny in their entirety Defendants', Standard Insurance Company, First Financial Benefits, Inc., Null∆Lairson, P. C., Members, and Phillip Lohec, motions for summary judgment

Respectfully submitted,

Gerald A. Burks
500 Ferry Rd. Unit 334
Galveston, Texas 77550
(409) 765-9401
(409) 765-9467 fax

By: /s/ Gerald A. Burks
Gerald A. Burks
SBN 03418500

ATTORNEY FOR PLAINTIFF

Certification

I, undersigned, hereby certify that a true and correct copy of Plaintiffs Amended Original Petition has been served, on February 1, 2006, by fax, upon the attorneys of record:

Jill B. Davenport, Attorney for Standard	214.939.2090
Charles B. Holm, Attorney for First	713.652.9702
Richard M. Forrest, Attorney for NullΔLairson	713.627.3738
Ervin A. Apffel, Jr., Attorney for Members	409.762.1155
Robert V. Shattuck, Jr., Attorney for Lohec	409.763.0668

/s/ Gerald A. Burks
Gerald A. Burks

Cause 04CV1063

CHRIS MALLIOS and	:	IN THE 122nd
ROBBIE YANCY	:	DISTRICT COURT
Plaintiff	:	
	:	
VS.	:	
STANDARD INSURANCE	:	
COMPANY, FIRST	:	
FINANCIAL, INC,	:	OF
NULLΔLAIRSON, P.C.,	:	
JIM YARBROUGH,	:	
EDDIE BARR, EDDIE	:	
JANEK, STEPHEN	:	
HOLMES, KEN CLARK	:	
AND PHILLIP LOHEC	:	GALVESTON COUNTY,
Defendants	:	TEXAS

Notice of Appeal

(Filed Mar. 28, 2006)

Comes now, Chris Mallios, Plaintiff, in the above styled and numbered cause, and files this notice of appeal:

I.

Chris Mallios appeals the judgments of the trial court granting summary judgments for Defendants rendered on January 27, 2006 and denying Plaintiff's Motion to Reconsider Granting Defendants' Motions for Summary Judgment on March 24, 2006.

/s/ Gerald A. Burks
Gerald Burks

Certification

I, undersigned, hereby certify that a true and correct copy of Plaintiff's Amended Original Petition has been served, on March 28, 2006, by fax, upon the attorneys of record:

Jill B. Davenport, Attorney for Standard	214.939.2090
Charles B. Holm, Attorney for First	713.652.9702
Richard M. Forrest, Attorney for NullΔLairson	713.627.3738
Ervin A. Apffel, Jr., Attorney for Members	409.762.1155
Robert V. Shattuck, Jr., Attorney for Lohec	409.763.0668

/s/ Gerald A. Burks
Gerald A. Burks

NO. 14-06-00294-CV

IN THE COURT OF APPEALS
FOURTEENTH SUPREME JUDICIAL DISTRICT
HOUSTON, TEXAS

CHRIS MALLIOS
Appellant

V.

STANDARD INSURANCE COMPANY, ET AL
Appellees

ON APPEAL FROM 122ND DISTRICT COURT,
GALVESTON COUNTY, TEXAS

APPELLANT'S BRIEF

TO THE HONORABLE JUSTICES OF THE FOURTEENTH COURT OF APPEALS:

Appellant Chris Mallios respectfully request this Court to find trial judge erred in granting Appellees' motions for summary judgment and to find Appellant entitled to summary judgment as a matter of law. The following:

Statement of the Nature of Case

Appellant and Appellees filed motions for summary judgment. Appellees' motions were granted. Appellant's motion was denied. From the trial court's orders, Appellant appealed.

Statement of Jurisdiction

This Court has jurisdiction pursuant to **Government Code Title 2, Chapter 22, §22.220(a).**

Issue

THE TRIAL JUDGE ERRED IN GRANTING APPELLEES SUMMARY JUDGMENT

Standard for Review

"[The courts] review the granting of summary judgment to determine whether the summary judgment proof establishes as a matter of law that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's cause of action or whether the defendant has established all elements of his affirmative defense. **Walker v. Harris, 924 S.W.2d 375, 377 (Tex.1996); Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970); Cantu v. Holiday Inns, Inc., 910 S.W.2d 113, 114-15 (Tex.App. – Corpus Christi 1995, writ denied).**

Statement of Fact

In September of 2004 (**Clerk's Record, hereafter referred to as CR, pg. 127**), Appellant filed his original petition. It alleged, between October of 2003 and July of 2004, Appellant discovered Appellees, in 1997, violated Insurance Code Article 21.21: Misrepresentation about Insurance Policy, Failure to Disclose; and violated Deceptive Trade Practice Act §17.50: Breach of Expressed or Implied Warranty which injured him. (**CR. pgs. 23, 25, 26**). On March 5, 2005, Appellant amended his original petition to include an allegation of conspiracy (**CR, pg. 31**).

Appellee Null Lairson, P. C., hereafter referred to as NL, filed an answer that contained a general denial and affirmative defenses which included statute of limitations, to Appellant's original petition. (**CR. 2, 3**) NL also filed for special exceptions to the original petition that were denied. (**CR. Pgs. 6, 10**).

Appellee Standard Insurance Company, hereafter referred to as Standard, filed its first amended answer to Appellant's amended original petition (**CR. pg. 39**). The answer contained a general denial and affirmative defenses which included Statute of Limitations, Res Judicata and Collateral Estoppel.

Appellees Yarbough, Barr, Janek, Holmes and Clark, hereafter referred to as Members, filed second and third amended original answers, but to Appellant's **original petition** (**CR. Pg.43, 99, first para**).

Appellee First Financial Benefits, Inc., hereafter referred to as First, filed its second amended original answer that contained a general denial, demand for jury trial and affirmative defenses which also included statute of limitations, res judicata and collateral estoppel. **(CR. pg. 47)**

Appellee Phil Lohec, hereafter referred to as Lohec, filed his first amended answer that contained a general denial, official immunity and statute of limitations. **(CR. Pg. 53)**

All parties filed motions for summary judgment. The trial judge granted Appellees' motions for summary judgment and denied Appellant's motion for summary judgment **(CR. 58, 60, 61, 63, 65)**.

Appellant filed a motion for reconsideration requested the trial judge to reconsider his rulings because the rulings were based in fact and not on law and the rulings denied Appellant his constitutionally guaranteed right to due process. Appellant also brought to the trial judge's attention Members' second and third amended answers were filed against Appellant's original petition and Appellant objected to Members requesting summary judgment on matters not pled against Appellant's amended original petition. **(CR. pg. 72, 73)**

After considering Appellant's motion and responses from Appellees, the trial judge denied Appellant's motion to reconsider **(CR. pg. 113)**. From the orders granting Appellees summary judgments and denying Appellant summary judgment and the denial of Appellant's motion for reconsideration, Appellant appealed.

Issue Restated

THE TRIAL JUDGE ERRED IN GRANTING APPELLEES SUMMARY JUDGMENT

Affirmative Defenses not Establish as a Matter of Law

> The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. **Texas Rules of Civil Procedure Rule 166a (c)**

Appellees did not establish, as a matter of law, the affirmative defense, statute of limitations. A cause of action based on the Texas Insurance Code or Deceptive Trade Practice act must be brought within two years of the events which give rise to the cause of action or within two years, with due diligence, of discovery of the events which give rise to the cause of action.[1] Appellant alleged, between October of 2003 and July 2004, he discovered events which occurred in 1997, that gave rise to his causes of action.[2] All Appellees, except Members, filed a general denial. The general denials put at issue Appellant's alleged discovery and put the burden on Appellant to adduce evidence, before a jury, when he discovered the events that gave rise to his causes of action.[3]

However, Standard offered summary judgment evidence[4] on the fact issue, discovery, and requested summary judgment to bar Appellant's causes of action based on statute of limitations. Notwithstanding, the pleadings which required Appellant to adduce evidence to a jury on the fact issue, discovery, and the jury demand, the trial judge considered Standard's summary judgment evidence[5] and granted Standard summary judgment. The trial judge abused his discretion and committed error.

Appellees did not establish, as a matter of law, the affirmative defense, res judicata. Res judicata . . . precludes re-litigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action.[6] It requires proof of the following elements: 1) a prior final judgment on the merits by a court of competent jurisdiction; 2) identity of parties or those in privity with them and 3) a second action based on the same claims that were raised or could have been raised in the first action.[7] If the prior judgment clearly shows what was decided by the original court, the offer of the pleading from the prior suit is not required.[8] Standard's summary judgment evidence was the judgment which did not clearly show what was decided by other court and the pleading filed in the other court.[9] After considering the judgment and pleading from the other,[10] the trial judge's granted Standard summary judgment based on a fact, the pleading, and not law, the judgment.[11] The trial judge abused his and committed error.

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[1] **Texas Insurance Code Art 21.21 §16(d); Deceptive Trade Practice Act §17.565, KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp., 988 S.W.2d 746, 749 (Tex.1999),**

[2] CR. pg. 15

[3] **Shell Chem. Co. v Lamb, 493 S.W.2d 742, 744 (Tex.1973)**

[4] CR. pgs. 78-81

[5] Ibid, pg. 113

Appellees did not establish, as a matter of law, the affirmative defense, collateral estoppel. The party asserting collateral estoppel has the burden of pleading and proving the elements of the doctrine.[12] [Appellees] . . . must establish that 1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action, 2) those facts were essential to the judgment in the first action and 3) the parties who litigated the issue in the first action were cast as adversaries.[13] Unless the parties and issues in the two suits are identical, a prior judgment is not admissible to prove a contested issue in another proceeding or to establish the facts on which the prior judgment was rendered.[14] Nevertheless, Standard offered summary judgment evidence, the judgment and pleading from a prior lawsuit,[15] to the trial judge to prove the elements of collateral estoppel. After considering the prior judgment, which did not show the parties and issues were identical to Appellant and his causes of action, the trial judge granted Standard summary judgment on the facts of the prior judgment to establish collateral estoppel and barred Appellant's causes of action.[16] The trial judge abused his discretion and committed error.

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[6] **State & County Mutual Fire Insur. Co. v. Miller, 52 S.W.3d 693, 696 (Tex 2001)**

[7] **Amstadt et al. v. United States Brass Corporation, 919 S.W.2d 644, 652 (Tex. 1996)**

[8] **City of Bridge City v. State of Texas, 792 S.W.2d 217, 224 (Tex.App. - Beaumont 1990, den)**

[9] CR. pgs. 84-93

[10] Ibid, 113

[11] Ibid,

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[12] **Avila v. St. Luke's Lutheran Hospital, 948 S.W.2d 841, 846 (Tex.App – San Antonio 1997 pet denied)**

[13] **Sysco Food Services, Inc. v. Trapnell 890 S.W.2d 796, 801 (Tex.1994)**

[14] **John Deere Company v. May, 773 S.W.2d 369, 374-5 (Tex.App – Waco 1989, den)**

[15] CR., pgs. 84-93

[16] Ibid, pgs. 63, 113

Appellees' Affidavits were Insufficient as a Matter of Law

> After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact. **TRCP Rule 166a (i)**

NL's motion for summary judgment was a no evidence motion. NL offered an affidavit[17] to support it. A challenge to the sufficiency of an affidavit may be raised, for the first time, on appeal if the affidavit is not specific in challenging a particular element of a claim . . . or is conclusory.[18]

NL's affidavit[19] did not specify any issue in Appellant's amended original petition that Appellant lacked evidence to prove. The affidavit explained the relationship between NL and the County of Galveston and the duty of care NL owed the county. Appellant brought this to the attention of the trial judge who considered it but found the affidavit supported NL's summary judgment and dismissed Appellant lawsuit with prejudice.[20] Appellant, also pointed out the affidavit supported the claim made by Appellant, against NL, for failure to disclose the wrongful use of Appellants premium payments:[21]

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[17] Ibid pgs. 95-97

[18] **Cuyler v. Minns, 60 S.W.3d 209, 213 (Tex.App. – Houston,[14th. Dist] 2001 pet. Denied)**

[19] CR. pg. 95

> "Null Lairson, P.C. was **not** required **to report the fact that Galveston County was purchasing insurance products from a mutual insurance company or that Galveston County was a member of the mutual insurer Standard Insurance Company** under any accounting standard or other reporting requirement."[22]

The trial judge, acted as jury, granted NL's summary judgment and dismissed Appellant's causes of action with prejudice, on an affidavit that was nonspecific as to any element of Appellant's claims, conclusory and contained an admission to NL's failure to disclose. The trial judge abused his discretion and committed error.

First also moved for a no-evidence summary judgment and provide its affidavit.[23] First's affidavit was nonspecific and conclusory. Like NL, First's affidavit provide admissions that support Appellant's allegation that First delivered Appellant's insurance premiums to Standard knowing Standard would misapply the premium payments:

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[20] Ibid, pgs. 60, 95, 113

[21] Ibid, pg. 72

[22] Ibid, pg. 95, 5th para

[23] Ibid, pg. 105

> First Financial is the broker of record and plan coordinator designated by the County of Galveston to assist in administering the Alternate Plan used by the County of Galveston in lieu of Social Security.
>
> The Alternate Plan consists of (1) life insurance benefits provided through Standard Insurance Company . . .
>
> . . . First . . . was responsible for . . . forwarding Galveston County's premium fund checks to Standard for payment of its policy premium.
>
> It is my understanding that when the commissioners' court learned it would receive the demutualization funds from Standard, it asked the benefits committee to recommend what should be done with the funds.
>
> . . . First . . . sent correspondence to the committee outlining two other options[24]

The trial judge, acted as jury, granted First summary judgment and dismissed Appellant's causes of action with prejudice, on an affidavit that was nonspecific as to any element of Appellant's claims; conclusory and contained admissions to First's delivery of Appellant's premium payments to Standard knowing Standard would misapply the premium payments.[25]

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[24] Ibid, pgs. 104, 105, 106

No Summary Judgment Evidence offered to Establish Official Immunity

Lohec filed his first amended answer and asserted official immunity.[26] The burden is upon the party asserting official immunity to bring summary judgment evidence to establish each element as a matter of law if summary judgment is granted.[27] The elements of official immunity are: the performance of a discretionary function in good faith and within the scope of the official's authority.[28] The burden was upon Lohec to produce summary judgment evidence to establish as a matter of law he was entitled to summary judgment based on official immunity.[29]

Lohec did not produce any summary judgment evidence on any of the elements of official immunity.[30] The trial judge had no summary judgment evidence to base his ruling that granted Lohec summary judgment and dismissed Appellant's causes of action with prejudice.[31] The trial judge abused his discretion and committed error.

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[25] Ibid, pg. 65

[26] Ibid, pg.53

[27] **Kassen v. Hatley, 887 S.W.2d 4, 9 (Tex. 1994)**

[28] **Ibid,**

[29] **Montgomery v. Kennedy, 669 S.W.2d 309, 310-11 (Tex.1984)**

[30] CR. pg. 74

Trial Judge Committed Erred When He Denied Appellant Summary Judgment

> A general denial of matters pleaded by the adverse party which are not required to be denied under oath shall be sufficient to put the same in issue. **TRCP Rule 92**

Members filed two amended answers after Appellant amended his original petition.[32] However, Members' answers were filed "to Plaintiffs' Original Petition."[33] Members did not file an amended answer that contained a general denial to Appellant's amended original petition. A general denial puts every essential element of plaintiff's case at issue and requires plaintiff to bring forth evidence, to the trier of fact, to prove the merits of the case.[34] If a defendant fails to deny the essential element of plaintiff's case, those elements are deemed admitted by defendant.[35] Members failed to deny Appellant's causes of action.[36]

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[31] Ibid, pg. 58

[32] Ibid, pgs. 43, 99, 13)

[33] Ibid, pg. 43, 1st para

[34] **Shell Chem. Co. v. Lamb, 493 S.W.2d 742, 744 (Tex. 1973)**

[35] **Jackson v. Biotechtronics, Inc., 937 S.w.2d 38, 41 (Tex.App. – Houston [14th] 1996, no writ)**

[36] CR. pg. 99

All the essential elements of Appellant's causes of action, as between Members and Appellant, were admitted by Members. As against Members, Appellant was entitled to summary judgment as a matter of law. The trial judge abused his discretion when he denied Appellant's request for summary judgment against Members.[37] The trial judge committed error.

Appellant's motion for summary judgment requested the trial judge to grant Appellant summary judgment, as a matter of law, that the Alternate Plan, Group Policy 602107, Insurance Code and the Demutualization Plan made certain representations to Appellant.[38] The documents were before trial judge without objection. The trial judge had but read the documents to ascertain whether the representations were made. Nevertheless, the trial judge denied Appellant's motion for summary judgments.[39]

Conclusion

The summary judgment procedure is designed to weed out unmeritorious claims, defenses and better define the issues. It is not meant to deprive litigants of their constitutional rights under Texas' and United States' constitutions. Litigants have a right to a jury trial and not have their cases disposed of by affidavit and deposition testimony.[40] Had the trial judge ruled Appellees did not established, as a matter of law, their affirmative defenses and had rejected the affidavits as insufficient, Appellees could still present those defenses to the jury they demanded. However the trial judge, granted Appellees' motions and dismissed Appellant's causes of action, denied Appellant's his constitutional right to due process and a jury trial on the merits of his case. The trial judge's rulings should be reversed in all respects.

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[37] Ibid, pgs. 61, 113

[38] Ibid, pg. 76

[39] Ibid, pg. 113

Prayer

Wherefore, Mr. Mallios prays this Court to reverse the rulings of the trial judge and enter summary judgments for Appellant and deny summary judgments to Appellees; and afford Mr. Mallios his constitutional right to due process before a jury of his peers.

Respectfully submitted,
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[40] **Collins v. County of El Paso, 954 S.W.2d 137, 145 (Tex.App. – El Paso 1997, pet. Denied)**

Certificate of Service

I, undersigned, hereby certify that a true and correct copy of Appellant's Brief has been served, May 12, 2006, by fax, upon the attorneys of record:

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/s/ Gerald A. Burks
Gerald A. Burks

NO. 14-06-00294-CV

IN THE COURT OF APPEALS
FOURTEENTH SUPREME JUDICIAL DISTRICT
HOUSTON, TEXAS

CHRIS MALLIOS
Appellant

V.

STANDARD INSURANCE COMPANY, ET AL
Appellees

ON APPEAL FROM 122ND DISTRICT COURT,
GALVESTON COUNTY, TEXAS

APPELLANT'S MOTION FOR REHEARING

(Filed Sep. 10, 2007)

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Oral Argument Not Requested

NO. 14-06-00294-CV

IN THE COURT OF APPEALS
FOURTEENTH SUPREME JUDICIAL DISTRICT
HOUSTON, TEXAS

CHRIS MALLIOS
Appellant

V.

STANDARD INSURANCE COMPANY, ET AL
Appellees

ON APPEAL FROM 122ND DISTRICT COURT,
GALVESTON COUNTY, TEXAS

APPELLANT'S MOTION FOR REHEARING

Comes Appellant and files his motion for rehearing and will show the following:

It would be a violation of Appellant's state and federal constitutional rights to due process and access to Texas courts and, respectfully, an abuse of this Court's discretion to not examine the appellate record to determine if the trial judge abused his discretion because Appellees' voluminous motions for summary judgment were not included in the appellant record.

Appellant provided written notice to Appellees that he would appeal the trial judge order denying Appellant's motion to reconsider the orders granting Appellees summary judgments. If Appellees motions were germane to the question of the trial judge's discretion, they could have supplemented the appellate record.

The trial judge lacked jurisdiction to grant summary judgments. The burden was on Appellees to establish their affirmative defenses and no genuine issue of material fact as a matter of law before the trial judge had jurisdiction to grant Appellees summary judgments as a matter of law.

In ***American Tobacco Company Inc. vs. Grinnell, 951 S.W.2d 420,(Tex. 1997),*** the court held:

> When reviewing a summary judgment, we follow these well-established rules . . . The movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts must be resolved in favor of the nonmovant. *Nixon v. Mr. Property Management Co., 690 S.W.2d 546*, 548-49 (Tex.1985). Summary judgment is proper if the defendant . . . establishes all elements of an affirmative defense to each

claim. *Montgomery v. Kennedy, 669 S.W.2d 309,* 310-11 (Tex.1984).

Appellees failed to carry their burdens to establish all elements of their affirmative defenses and failed to establish there was no genuine issue of material fact on any claim of Appellant. Once the trial judge entered his orders granting Appellees summary judgments, Appellant filed his motion for reconsideration of those orders, with notice to Appellees, to inform the trial judge Appellees failed to carry their burdens.

City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 678 (Tex. 1979)

> We are not to be understood, however, as shifting the burden of proof that exists in summary judgment proceedings. The trial court may not grant a summary judgment by default for lack of an answer or response to the motion by the non-movant when the movant's summary judgment proof is legally insufficient.(fn5) The movant still must establish his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law. *See Swilley v. Hughes, 488* S.W.2d 64, 67 (Tex.1972). Summary judgments must stand on their own merits, and the nonmovant's failure to answer or respond cannot supply by default the

> summary judgment proof necessary to establish the movant's right.
>
> While it would be prudent and helpful to the trial court for the nonmovant always to file an answer or response, the nonmovant needs no answer or response to the motion to contend on appeal that the grounds expressly presented to the trial court by the movant's motion are insufficient *as a matter of law to support summary judgment.*

Appellant included in the appellate record his "Plaintiff's Motion to Reconsider Grants of Defendants' Motions for Summary Judgment" which identified the affirmative defenses, what was offered to establish the affirmative defenses and what was offered to establish no genuine issue of material fact and Appellant's evidence that defeated the claims for the affirmative defenses and on genuine issue of material fact. Appellant is not required to include Appellees' motions for summary judgment with their exhibits in the appellate record before this Court can review the appellate record to determine if the Appellees carried their burdens.

The Affirmative Defense of Statute of Limitation.

With regards to the affirmative defense of statute of limitation, whether Appellees were entitled to it, as a matter of law, would be established from the petition and answer. The appellate record contained Appellant's amended original petition which alleged the "discovery rule". Appellees amended answers which contained a general denial that required Appellant to put forth facts before a jury to prove each and every element of his case, and the affirmative defense statute of limitations.

The appellate record also contained the trial judge orders granting Appellees' motions for summary judgment on the basis Appellees, as a matter of law, established their entitlement to the affirmative defense of statute of limitation; Appellant's motion for reconsideration Exhibit A which pointed out to the judge, Appellant's amended original petition contained the "discovery rule"; what Appellees offered to establish the defense as a matter of law and the trial judge order denying Appellant's motion for reconsideration wherein the trial judge's order "motions previously filed and the court, after reviewing Plaintiff's motion, the response filed by defendants and hearing the argument of counsel, . . . denied." Appellees failed to establish, as a matter of law, the affirmative defense statute of limitation. *The trial court may not grant a summary judgment . . . when the movant's summary judgment proof is legally insufficient.*[1]

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[1] ***City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979)**

Res Judicata and Collateral Estoppel

With regards to the affirmative defense of res judicata and collateral estoppel, whether appellees were entitled to it as a matter of law depended on establishing the cause of action and parties were the same cause of action and parties in a "prior lawsuit." The appellate record contained Appellant's amended original petition; Appellees amended answers with the affirmative defenses of res judicata and collateral estoppel; the prior lawsuit; the trial judge order granting Appellees' motions for summary judgment. In order to establish the affirmative of res judicata: ***Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 652 (Tex. 1996)***

> Res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action. *Barr v. Resolution Trust Corp., 837* **S.W.2d** 627, 628 (Tex.1992). It requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. *See Texas Water Rights Comm'n v. Crow Iron Works, 582* **S.W.2d** 768, 771-72 (Tex.1979).

John Deere Co. v. May, 773 S.W.2d 369, 374-375 (Tex.App. – Waco 1989, den.)

> [U]nless the parties and issues are identical, a judgment, verdict or decree is not admissible to prove a contested issue in another proceeding or to establish the facts on which the judgment, verdict or decree was rendered. *See M'Camant v. Roberts,* 66 Tex. 260, 1 S.W. 260, 261 (1886). . . .

The appellate record showed Appellees failed with what they offered to establish identity of parties and issues. The trial judge was without jurisdiction to grant summary judgment where Appellees failed to establish the affirmative defense of res judicata as a matter of law.

In order to establish the affirmative defense of collateral estoppel: ***Sysco Food Serv., Inc. v. Trapnell, 890 S.W.2d 796, 802 (Tex. 1994)***

> A party seeking to assert the bar of collateral estoppel must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action.

The appellate record showed Appellees made no attempt to establish "facts" of the instant case were fully and fairly litigated in the "prior lawsuit." And, that the "facts" were essential to the judgment of the "prior lawsuit." The trial judge was without jurisdiction to grant summary judgment where Appellees failed to establish the affirmative defense of collateral estoppel as a matter of law.

Affidavits in Support of No-Evidence Motions for Summary Judgment

"Appellees may base a motion for summary judgment on the assertion that there is no evidence of one or more essential elements of the opposing party's claim or defense. The movant need not present any summary judgment evidence to support the ground. The specification of each element challenged and the good faith assertion that there is no evidence to support the specified element is all that is required to put the burden on the opposing party to produce summary judgment evidence raising a genuine issue of material fact relevant to the challenged element. [T.R.C.P. 166a(i)]."

The appellate record contained Appellant's amended original petition, Appellee's amended answer, Appellee's motion for special exceptions, order denying special exceptions and Appellee's affidavit. Appellee failed to establish no genuine issue of material fact as a matter of law. The trial judge abused his discretion in finding, based on the affidavit, no genuine issue of material fact.

Official Immunity

The appellate records contained Appellee Lohec second amended answer asserting official immunity. Appellees must establish each of the elements of official immunity as a matter of law, i.e., (1) acting within the scope of their authority (2) in performing their discretionary duties in (3) good faith ***Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417, 425 (Tex.) 2004***. At the summary judgment hearing, Appellee Lohec offered nothing to establish his claim of official immunity. The trial judge abused his discretion when he ordered the affirmative defense of official immunity was established as a matter of law.

No Answer Filed to Appellant's Amended Original Petition

The appellate record contained Appellee Members, second amended answer to Appellant's **original petition** after Appellant filed his amended original petition. Appellee Members did not put at issue any of the allegations contained in Appellant's amended original petition. "If the defendant has failed to make a required denial, the plaintiff's allegations are deemed to have been admitted ***BC & S Const., Inc. v. Action Elec. Co., 753 S.W.2d 841, 842 Tex.App. – Fort Worth 1988 no writ***. The trial judge abused his discretion when he granted Appellee Members summary judgment.

Conclusion

The trial judge lacked jurisdiction to enter his orders granting Appellees summary judgment. This Court abused its discretion in not examining the appellate record because Appellees' motions for summary judgment were not contained. If the judge's orders granting Appellees summary judgment are not reversed, Appellant is denied his federal and state constitutional rights to due process and access to Texas courts.

Wherefore premise considered Appellant pray the Court to grant his motion for rehearing and reverse the trial judge's orders granting summary judgments.

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Certificate of Conference

I, undersigned, hereby certify that a reasonable effort was made to confer with opposing council and if a response was not received by September 7, 2007, I would represent to the court their opposition to the motion for rehearing.

/s/ Gerald A. Burks
Gerald A. Burks

Certificate of Service

I, undersigned, hereby certify that a true and correct copy of Appellant's Brief has been served, September 6, 2007, by fax, upon the attorneys of record:

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/s/ Gerald A. Burks
Gerald A. Burks

NO. 07-0898

IN THE
SUPREME COURT OF TEXAS

CHRIS MALLIOS,
Petitioner
v.
STANDARD INSURANCE COMPANY, ET AL
Respondents

On appeal from the Fourteenth Court of Appeals
Houston, Texas

PETITION FOR REVIEW

(Filed Nov. 1, 2007)

Respectfully submitted,

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Statement of the Case

This suit was brought for violations of the Texas Deceptive Trade Practices Act and Texas Insurance Code. Appellees were granted summary judgment on their affirmative defenses and Appellant was denied summary judgment and his lawsuit was dismissed with prejudice. Appellant then timely filed "Plaintiff's Motion to Reconsider Grants of Defendants' Motions for Summary Judgment". The Honorable John Ellisor of the 122nd District Court of Galveston County denied Appellant's motion. Appellant appealed.

Chris Mallios was Appellant and Standard Insurance, First Financial Benefits Inc, Null Lairson, James Yarbrough, Eddie Barr, Eddie Janek, Stephen Holmes, Ken Clark and Phillip Lohec were Appellees before the Fourteenth Court of Appeals in Houston.

Senior Justice Margaret Garner Mirabal wrote the opinion, Justice Anderson concurred and Justice Kem Thompson Frost concurred in part and dissented in part. The appellate court affirmed the trial judge's ruling. The opinion was unpublished.

Statement of Jurisdiction

The Supreme Court of Texas has jurisdiction over this appeal under Sections 22.001(a)(1) and 22.001(a)(6) of the Texas Government Code. The Supreme Court of Texas has jurisdiction to decide question of law not disposed of by the appellate court ***Segrest v. Segrest*, *649 S.W.2d 610, 612 (Tex* 1983)**

Issue Presented

The Appellate Court refused to exercise its properly invoked jurisdiction and render a decision on Appellant's briefed point of error abuse of the trial judge's discretion.

Statement of the Facts

Appellant filed suit alleging violations of the Texas Deceptive Trade Practice Act and Insurance Code and that the violations were discovered between 2003 and 2004. The petition was amended to allege conspiracy. Appellees Standard, First Financial, Null Lairson and Phillip Lohec filed amended answers that contained general denials and affirmatives defenses. Appellee Members file their amended answer alleging the same defenses but to Appellant's original petition.

All parties moved for summary judgment. The trial judge granted summary judgment to Appellees and denied Appellant's summary judgment with prejudice. Appellant then filed a timely motion before the trial judge to reconsider granting Appellees' summary judgments asserting that Appellees did not sustain their burden of establishing their affirmative defenses as a matter of law. The trial judge denied the motion to reconsider.

Appellant gave written notice he would appeal the grant of Appellees' summary judgments, denial of his summary judgment with prejudice and denial of

Appellant's motion to reconsider to the Fourteenth Court of Appeals *(Appendix, Exhibit 3)*. The appellate record contained the notice of appeal, Appellant amended original petition, answers of each of the appellees, Null Lairson's special exceptions and the order denying them, five separate orders granting the motions for summary judgment of Standard, First Financial, Lairson, the Members and Lohec, Mallios's motion to reconsider with exhibits, the order denying Appellant's motion to reconsider, designation of the record *(Appendix, Exhibit 1 appellate court's opinion pg. 4; Exhibit 3 Designation of Record)*. Appellant only briefed the denial of the motion to reconsider.

The appellate court affirmed the trial judge:

> Majority Opinion
> Appellant Chris Mallios appeals the trial court's grant of summary judgments in favor of appellees, contending that various appellees (1) failed to establish as a matter of law the affirmative defenses of limitations, res judicata, and collateral estoppel, (2) provided insufficient affidavits in support of no-evidence motions for summary judgments, and (3) failed to establish official immunity. Mallios also contends the trial court erred in denying his motion for summary judgment. We affirm *(Appendix, Exhibit 1)*

The appellate court did not decide Appellant's briefed point of error the abuse of the trial judge's discretion for denying Appellant's motion to reconsider.

Summary of the Argument

The appellate court failed to decide Appellant's briefed point of error. The appellate court's jurisdiction was properly invoked. The appellate record contained sufficient evidence to show the trial judge abused his discretion when the trial judge denied Appellant's motion to reconsider where Appellees failed to establish their entitlement to summary judgment as a matter of law. This Court has jurisdiction to decide the briefed point of error and reverse the trial judge and uphold Appellant constitutional right to a trial by jury.

Argument

In ***Segrest, supra at 610,*** "[w]hile the court of appeals has not disposed of the points raised by petitioner, these points present only questions of law. We may, therefore, dispose of them now instead of requiring the parties to go back to the court of appeals and then possibly return here with a second application for writ of error."

Appellees, as movant, in a summary judgment proceeding, have the burden to establish their affirmative defenses as a matter of law. If Appellant, as nonmovant, raises a fact issue on any element necessary to establish the affirmative defense, the affirmative defense is not established as a matter of law. The trial judge is to "indulge every reasonable inference and resolve any doubts in the nonmovant's favor. On appeal, the movant still bears the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Further on appeal, the non-movant need not have answered or responded to the motion to contend that the movant's summary judgment proof is insufficient as a matter of law to support summary judgment." ***Rhone-Poulene, Inc. v. Steel, 997 S.W.2d 217, 223, 224, (Tex. 1999).***

After the trial judge granted Appellees' motions for summary judgment, Appellant filed his motion to reconsider, which is contained in the appellate record, pointing out to the trial judge Appellees had not established as a matter of law their entitlement to their affirmative defenses and the fact question raised on each of the affirmative defenses. *(Appendix, Exhibit 2 Plaintiff's Motion to Reconsider Grants of Defendants' Motions for Summary Judgment)*

1. Statute of Limitation

Appellant's amended original petition contained the allegation that Appellant did not discover the alleged violations until 2004. Appellee Standard representing all other Appellees asserted that the statute of limitation applied because Appellant received constructive notice of the alleged violations before the date alleged. Standard cited ***HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex.1996).*** Appellant argued his allegations were violation of Deceptive Trade Practice and Insurance fraud that ***HECI*** did not apply to Deceptive Trade Practice and

Insurance fraud and cited ***Ojeda de Toca v. Wise, 748 S.W.2d 449, 450 (Tex.1988)*** *(Appendix, Exhibit 2, pg. 3)*

Appellee Standard further offered what it labeled as "material undisputed fact" to support its argument. *(Appendix Exhibit B, Exhibit A)* Appellant pointed out to the trial judge he raised a fact question to be determined by the jury *(Appendix, Exhibit 2, pg. 3)*

2. Res Judicata

"Res judicata . . . precludes re-litigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action, ***State & County Mut. Fire Ins. Co. V. Miller, 52 S.W.3d 693, 696 (Tex. 2001).*** It requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action, ***Amstadt v. U.S. Brass 919 S.W.2d 644, 652 (tex. 1996).***"

Appellee Standard, again representing all other Appellees, proffered to the trial judge a "prior lawsuit" a writ of mandamus, filed by an elected official to protect the elected official's statutory duties and to enforce other elected and appointed officials to perform their statutory duties, "prior summary judgment order and "material undisputed facts" to support their claim to the affirmative defense res judicata.

(Appendix, Exhibit 2, Exhibit B). Appellant, a private citizen, cause of action is violation of Deceptive Trade Practice Act and misrepresentation of an insurance policy. In Appellant's motion, he pointed out to the trial judge the "prior lawsuit" did not establish as a matter of law the elements of res judicata as set out in ***Amstadt, supra.*** *(Appendix, Exhibit 2 pg. 4)*

3. Collateral Estoppel

"Collateral estoppel . . . bars re-litigation of any ultimate issue of fact that was actually litigated and essential to the judgment in a prior suit ***Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984).*** The party asserting collateral estoppel has the burden of pleading and proving the elements of the doctrine. [The party] must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action, (2) those facts were essential to the judgment in the first action and (3) the parties who litigated the issue in the first action were cast as adversaries ***Sysco Food Servs., Inc. v. Trapnell, 890 S.W.2d 796, 801 (Tex. 1994).***

Appellee Standard proffered the same "prior lawsuit," summary judgment order and "material undisputed facts" to establish, as a matter of law, the affirmative defense of collateral estoppel *(Appendix, Exhibit 2, Exhibit B).* In the motion to reconsider, Appellant pointed out to the trial judge what Standard offered did not entitle Appellees to the affirmative defense collateral estoppel as a matter of law. *(Appendix, Exhibit 2, pg. 5)*

4. The Affidavit of Appellee Null Lairson

The appellate record contained the affidavit offered by Null Lairson *(Appendix Exhibit C, Designation of Record)*. The appellate record also contained the motion for special exceptions filed by Appellee Null Lairson and the trial judge's order denying Null Lairson's special exception. Null Lairson's special exception alleged no notice, lack of standing, no cause of action stated and non applicability of Deceptive Trade Practice Act *(Appendix, Exhibit 3 Plaintiff's Designation of Record, pg 1)*. The trial judge did not order Appellant to re-plead his amended original petition.

Appellant pointed out to the trial judge summary judgment should not be granted in this instance because the trial judge had not ordered Appellant to re-plead his amended original petition *(Appendix, Exhibit 2 pg. 5)*. "Summary judgment based on a pleading deficiency is proper if a party has had an opportunity by special exception to amend and fails to do so, or files a further defective pleading." ***Natividad v. Alexis, Inc. 875 S.W.2d 695, 690 (Tex. 1994).***

5. Appellee Members affirmative defenses

Appellee Members did not assert its affirmative defenses against Appellant's amended original petition

(Appendix, Exhibit 2 Exhibit D). Appellant objected and pointed out to the trial judge Members' motion for summary judgment asserting their affirmative defenses was not pled to his amended original petition *(Appendix, Exhibit 2B, pg. 7)*

6. Appellee Lohec's affirmative defense Official Immunity

Appellee Lohec alleged official immunity but offered nothing to establish as a matter of law he was entitled to it *(Appendix, Exhibit 2, pg. 8)*.

Prayer

The purpose of the summary judgment procedure is to permit the trial court to promptly dispose of cases that involve unmeritorious claims or untenable defenses. It is not to deprive litigants of their right to a trial by jury or to try a case by affidavit and deposition testimony ***Collins v. County of El Paso, 954 S.W.2d 137, 145 (Tex.App. – El Paso 1997, pet. Denied; Gulbenkian v. Penn, 151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952).*** If this Court affirms the trial judge's abuse of discretion when the trial judge granted summary judgment to Appellees who had not met their burden to establish as a matter of law their affirmative defenses, it will compound the injury done to Appellant, a private citizen of this state, by the trial judge and violate Appellant's federal and state constitutional rights to due process of law. His "right to a trial by jury" will be destroyed.

Appellees had the burden before the trial judge and on appeal to establish they were entitled to summary judgments as a matter of law. They failed to carry their burden in both venues. Assuring Appellant's constitutional right to due process of law will not prejudice Appellees right to present their affirmative defenses to the jury.

Therefore premise considered Appellant prays this Court to reverse the decision of the trial judge and assure Appellant's constitutional right to due process of law.

Respectfully submitted,

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By: /s/ Gerald A. Burks
Gerald A. Burks
SBN 03418500

Certification

I, undersigned, hereby certify that a true and correct copy of Appellant's Petition for Discretionary Review has been served, on October 28, 2007, by fax, upon the attorneys of record:

Jill B. Davenport, Attorney for Standard	214.939.2090
Charles B. Holm, Attorney for First	713.652.9702
Richard M. Forrest, Attorney for NullvLairson	713.627.3738
Ervin A. Apffel, Jr., Attorney for Members	409.762.1155
Robert V. Shattuck, Jr., Attorney for Lohec	409.763.0668

/s/ Gerald A. Burks

NO. 07-0898

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The Appellate Court refused to exercise its properly invoked jurisdiction and render a decision on Appellant's briefed point of error abuse of the trial judge's discretion

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Appendix

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NO. 07-0898

IN THE

SUPREME COURT OF TEXAS

CHRIS MALLIOS,
Petitioner

v.

STANDARD INSURANCE COMPANY, ET AL
Respondents

On appeal from the Fourteenth
Court of Appeals, 14-06-00294-CV

Houston, Texas

MOTION FOR REHEARING

Statement of Fact

Mr. Mallios, timely filed written notice of appeal asserting three points of error. One point of error was the grant of Appellees' motions for summary judgment; a second point of error was the denial of Mr. Mallios' motion for summary judgment and the third point of error was the denial of his motion to reconsider. The third point of error is the failure of Appellees to establish, as a matter of law, their entitlement to affirmative defenses.

In the brief filed with the court of appeals, Mr. Mallios abandoned the first two points of error. He did not make an appellate argument on the first two points of error. He did not identify a standard for review. He did not cite any case or law authority for granting the first two points of error. He did not include in the appellate record the motions for summary judgment filed by the Appellees.

Mr. Mallios, without objection, prepared and filed a designation of the record served Appellees and included it as part of the appellate record with the orders granting summary judgment, his motion to reconsider, the order denying his motion to reconsider and notice of appeal.

Mr. Mallios did brief the third point of error. He made the argument, in the brief, that the trial judge abused his discretion to grant the motions for summary judgment because the Appellees had not established their right to summary judgment as a matter of law. He cited case authority as support for his argument. He cited to the appellate record his motion to reconsider and the trial judge order denying the motion to reconsider. He requested the court of appeals to reverse the trial judge's order denying his motion to reconsider which would have allowed him his state and federal constitutional right to a trial by jury.

The court of appeals' written opinion addressed the first two points of error that were abandoned by Mr. Mallios. The court of appeals affirmed the trial judge's orders granting the motions for summary judgment because the appellate record did not contain Appellees' motions for summary judgment presented to the trial judge. The court of appeals did not include in its written opinion a ruling on Mr. Mallios' briefed third point of error abuse of the trial judge's discretion. Mr. Mallios filed a motion for rehearing asserting that the court of appeal had not rendered a decision on his third point of error, the abuse of the trial judge's discretion. The motion for rehearing was overruled.

This Court denied Mr. Mallios' petition for review because it determined Mr. Mallios' petition presented no error that required reversal or that it was of such importance to the jurisprudence of the state as to require correction.[1]

Mr. Mallios respectfully request this Court to reconsider its denial and grant the petition for review and will show the following reasons to support his request.

The Court of Appeals' jurisdiction to enter a written opinion on the first two points of error abandoned by Mr. Mallios was not evoked by Mr. Mallios' Brief and the Appellate Record

The abandoned two points of error contained in the notice of appeal: the orders granting motion for summary judgment to Appellees and the order denying motion for summary judgment to Mr. Mallios, were not briefed. Mr. Mallios' brief did not present "a clear and concise argument" as to why the court of appeals should overrule the orders; he did not present a standard of review and he did not cite any authority or cite to the appellate record to support why the court of appeals should overrule the abandoned two points of error **Rule of Appellate Procedure, Requisites of Briefs Rule 38.1(h).** In ***Harco National Insurance Col. V. Villanueva, 765 S.W.2d 809, 810 (Tex.App.-Dallas 1989),*** after appellant briefed and urged his point of error, he expressly withdrew the point during oral argument leaving nothing for the court to review. In ***McDuff v. State, 936, S.W.2d 607, 614 (Tex.Crim.App 1997)*** the court said "Appellant generally discusses the evidence for points one through four together in his brief, but does not propose a standard of reviewing factual sufficiency in a capital case or specifically argue how the evidence is insufficient under any standard of reviewing factual sufficiency. We conclude that point number three is insufficiently briefed, presents nothing for review."

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[1] **Rules of Appellate Procedure Rule 56.1(b)**

The jurisdiction of the court of appeals was not evoked to render its written opinion on the two abandoned points of error in this cause. The court of appeals ignored **Rule of Appellate Procedure Rule 38.1(h) Requisites of Brief** and its written opinion did not conform to **Rule 47.1 Written Opinion**.

The Court of Appeals' jurisdiction was evoked to enter a written opinion on Mr. Mallios' Sole Point of Error Abuse of Discretion but it did not render a written opinion

The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.[2] In ***Light v. State, 15 S.W.3d 104, 105, (Tex.Crim.App 2005)***

> The courts of appeals are required to review every argument raised by a party that is necessary to the disposition of that appeal. *See* Tex.R.App. Proc. 47.1(a);(fn/l) *Davis v. State,* 817 S.W. 345, 346 (Tex.Cr.App.1991) (holding that the courts of appeals should not dismiss a point of error when it is properly briefed by a party). Failure by a court of appeals to address a point of error properly raised by a party requires remand for consideration of that point of error. *See Davis,* 817 S.W.2d at 346 (remanding a neglected point of error to the court of appeals for consideration); *cf. Weatherford v. State,* 828 S.W.2d 12, 13 (Tex.Cr.App.1992) (holding that the remedy for a failure to address a reply to point of error on appeal is to vacate and remand the case to the court of appeals to consider the neglected argument).

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[2] **Ibid, Rule 47.1**

Mr. Mallios' Third Point of Error was properly briefed. **Rules of Appellate Procedure Rule 3.1(h)** requires "the brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. Mr. Mallios' brief asserted the trial judge abused his discretion when he granted summary judgments to Appellees because they had not carried their burden of establishing, as a matter of law, their entitlement to summary judgment based on their affirmative defenses. In the brief Mr. Mallios cited his motion to reconsider and the order denying the motion to reconsider contained in the appellate record. In the brief Mr. Mallios cited Walker v. Harris, 924 S.W.2d 375, 377 (Tex.1996); .Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970); Cantu v. Holiday Inns, Inc., 910 S.W.2d 113, 114-15 (Tex.App.-Corpus Christi 1995, writ denied) to support his argument. The court of appeals did not render a written opinion on Mr. Mallios' briefed point of error abuse of the trial judge's discretion.

This Court in ***Segrest v. Segrest, 649 S.W.2d 610, 612 (Tex 1983),*** determined the court of appeals error in not considering a point of error by one of the parties and because the point of error dealt with a matter of law rendered the decision itself instead of remanding it to the court of appeals.

Prayer

Mr. Mallios prays this Court to grant his motion for rehearing and consider his petition for review and reverse the trial judge's order denying Mr. Mallios' motion to reconsider, deny Appellees' motions for summary judgments which will assure Mr. Mallios' constitutional right to a jury trial.

Respectfully submitted,
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By /s/ Gerald A. Burks
Gerald A. Burks
SBN 03418500
ATTORNEY FOR APPELLANT

Certificate of Conference

I certified that I conferred with all parties by fax informing them that I will inform the Court with this filing of their objection to the motion for rehearing.

/s/ Gerald A. Burks
Gerald A. Burks

Certificate of Service

I, undersigned, hereby certify that a true and correct copy of Appellant's motion for rehearing has been served, January 19, 2008, by fax, upon the attorneys of record:

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/s/ Gerald A. Burks
Gerald A. Burks

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February 11, 2008

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RE: Case Number: 07-0898
Court of Appeals Number: 14-06-00294-CV
Trial Court Number: 04CV1063

Style: CHRIS MALLIOS
v.
STANDARD INSURANCE COMPANY, ET AL.

Dear Counsel:

Today the Supreme Court of Texas granted the Motion to Include Appellant's Brief as an Exhibit to Motion for Rehearing in the above-referenced-case.

Sincerely,

/s/ Blake A. Hawthorne

Blake A. Hawthorne, Clerk

by Jessica Hamby, Deputy Clerk